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No. ....
IN THE

Supreme Court of the United States

October Term 1981

LEONARD H. TOSE, TOSE INC., and THE PHILADELPHIA EAGLES FOOTBALL CLUB,

Petitioners,

vs.

FIRST PENNSYLVANIA BANK, N.A.; BUNTING, JOHN R.; PEMBERTON, JOHN C.; BARNESS, HERBERT; FORSTATER, SIDNEY; PROVIDENT NATIONAL BANK; CHASE MANHATTAN BANK, N.C.; GIRARD BANK; PHILADELPHIA NATIONAL BANK; and FIRESTONE, JOHN D.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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QUESTIONS PRESENTED.

1. Whether a conspiracy between a bank and a third party to restrict and ultimately to deny bank credit is standing alone a violation of Section 1 of the Sherman Act?

2. Does an admitted conspiracy to deny bank credit and use coercive banking powers violate the Sherman Act standing alone, or does it require the additional element, as the Court below held, that the credit victim be so situated that damage to him results in damage to "competition" and not just a "competitor"?

3. Is the Sherman Act violated by an agreement between the biggest bank in Philadelphia and a race track owner, who is not the bank's customer, to force a distress sale of a general partner's controlling interest in a professional football club to a limited partner by (a) denying credit; (b) prematurely calling a term loan which the bank's lawyers said was not callable; (c) forcing a humiliating take-over of the club followed by an abusive interference with its business; (d) threatening and implementing a boycott by other banks; and (e) promising to "kill" the borrower before legal relief could be secured for the admitted wrongs?

4. Whether the Bank Holding Company Act, 12 U.S.C. 1972(1)(C), applies to the actions of a bank and its officers in insisting that the borrower hire as chief executive officer a known disloyal subordinate conspiring with the bank to displace the general partner (the bank's customer) with a limited partner (not the bank's customer) as a condition either for continuing a term loan to its stated maturity or for re-lending the borrower his own money on deposit?

5. Whether joint written loan agreements between and among respondent banks in hundreds of written contracts involving billions of dollars by which the banks agree to follow each other's changes in prime rate on "prime-plus"

contracts constitute *per se* price-fixing under the Sherman Act, and whether the effect of such agreements on single-bank "prime-plus" contracts is (a) a question for the jury or (b) automatically inferred on summary judgment when accompanied by a long history of identity of prime rate changes, differing bank costs on acquiring money, differing costs of doing business, monthly meetings by bank chief executives, and specific meetings by loan officers on Joint contracts agreeing on the interest rate to be charged?

6. Whether a borrower who has paid $6,000,000 in interest on a "prime-plus" loan has "standing" to sue a group of bankers, including his own, who since the vogue of "prime-plus" loans have agreed in hundreds of joint loans to follow each other's prime rate changes?

The Court of Appeals inserted the "standing" issue for the first time on appeal after saying that the District Court may have erred in granting the banks summary judgment on the "price-fixing" charge.

7. Whether the Court of Appeals usurped the jury's constitutional prerogative in compartmentalizing the conspiracy to use coercive banking tactics by dismembering the banking boycott evidence from the actions of the original bank, and thereafter applying the doctrine of *U.S. v. Colgate & Co.*, 250 U.S. 300 (1919) — or whatever is left of it — to a situation involving a plurality of actors in conduct which the Court itself in part characterized as "collective" and "ruthless"?

8. Whether the pervasive errors of the trial court and the Court of Appeals prejudiced the petitioners on their pendent claims for interference with existing and prospective business advantage and on their related defense to a counterclaim on a contract action involving the same operative facts as in the federal claims?

TABLE OF CONTENTS

Page

Questions Presented i

Opinion Below 1

Jurisdiction 2

Statutes Involved 2

Statement of the Case 2

A. Nature and History of the Case 2

B. Statement of the Facts 4

Reasons for Granting the Writ 17

I.

A Conspiracy to Restrict Access to the Credit Market Stands on Its Own; It Does Not Require Additional Evidence That It Affected "Competition" in Some Other Line of Commerce 19

II.

The "Standing" Issue First Raised by the Circuit Court Was in Fact a "Causation" Issue for the Jury 21

III.

The Bank Holding Company Act Claims 22

Conclusion 23

Appendix A. Opinion of the Court of Appeals for the Third Circuit ..... App. p. 1

Appendix B. Opinion of the United States District Court, Eastern District of Pennsylvania, May 28, 1980 46

Appendix C. Pertinent Statutes Involved 69

TABLE OF AUTHORITIES CITED

Cases	Page
Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979)	12
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	17, 20
Catalano v. Target Sales Inc., 446 U.S. 643 (1980)	19
Continental Ore Company v. Union Carbide, 370 U.S. 690 (1960)	19, 21, 22
Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)	17, 20
Poller v. CBS, Inc., 368 U.S. 464	19, 20
Radovich v. National Football League, 352 U.S. 445 (1958)	20
Simpson v. Union Oil Co., 377 U.S. 13 (1964)	13
United States v. Colgate & Co., 250 U.S. 300 (1919)	ii
United States v. Container Corp., 393 U.S. 333 (1969)	14, 21, 22
United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940)	14, 22
Rule	
Federal Rules of Civil Procedure, Rule 50	3
Statutes	
Clayton Act, Sec. 4	2
Sherman Act, Sec. 1	i, ii, 2, 17, 18
Sherman Act, Sec. 2	2
United States Code, Title 12, Sec. 1972(1)	2
United States Code, Title 12, Sec. 1972(1)(C)	i, 2, 17, 18, 22
United States Code, Title 12, Sec. 1975	2
United States Code, Title 28, Sec. 1254(1)	2

Page

Textbook

"An Analytical Framework for Antitrust Standing", 86 Yale Law Journal, pp. 809, 810 18

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals in the proceeding on April 30, 1981.

In addition, Petitioners respectfully pray that a Writ of Certiorari issue to review that final order of the United States Court of Appeals, Third Circuit, on May 22, 1981, which denied Petitioners' Petition for Rehearing In Banc.

OPINION BELOW.

The opinion and judgment of the United States Court of Appeals, Third Circuit, appears as Appendix A hereto. The opinion of the District Court for the Eastern District of

Pennsylvania on summary judgment is reported at 492 F.Supp. 246. It was filed on May 28, 1980 and appears as Appendix B hereto.

JURISDICTION.

The judgment and opinion of the Court of Appeals, Third Circuit, was entered on April 30, 1981. Petitioners Petition for Rehearing was denied on May 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This Petition was filed within ninety days of the Third Circuit's Order denying a rehearing.

STATUTES INVOLVED.

The following statutes involved are set forth in Appendix C:

Section 1 of the Sherman Act. 15 U.S.C. 1

Section 4 of the Clayton Act

Section 1972(1)(C) of the Bank Holding Company Act, 12 U.S.C. 1972 (1)(C).

STATEMENT OF THE CASE.

A. Nature and History of the Case.

On May 5, 1978 plaintiffs Leonard H. Tose, the Philadelphia Eagles Football Club ("Eagles"), and Tose, Inc. filed suit in the United States District Court for the Eastern District of Pennsylvania against defendants First Pennsylvania Bank, N.A. ("FPB"); its Chairman, John Bunting; its Vice Chairman, John Pemberton; Sidney Forstater, a former Tose and Eagles employee; Herbert Barness and John Firestone, limited partners of the Eagles; Philadelphia National Bank; Provident National Bank; Girard Bank, and Chase Manhattan Bank, N.A. Plaintiffs' Amended Complaint asserts violations of Sections 1 and 2 of the Sherman Act and of the Bank Holding Company Act [12 U.S.C. 1972(1), 1975], and pendent state claims of tortious inter-

ference, and conspiracy to interfere, with contracts and prospective advantageous business relations, and intentional infliction of emotional distress. Defendant Forstater filed four counterclaims against Tose and the Eagles alleging breaches of contracts and defamation under state law.

Plaintiffs and the defendant limited partners, Barness and Firestone, settled their claims against each other* by June 1979, with each partner selling their interest to Tose. At the time of trial, Tose owned 99% of the Eagles.

Prior to trial each remaining defendant filed a motion for summary judgment and partial summary judgment on Count IV of the Amended Complaint, and plaintiffs filed a motion for summary judgment on said Count, which alleged that the banking defendants conspired to fix prime interest rates in four Pennsylvania counties.

On May 16, 1980 the Court entered an Order granting defendants' summary judgment motions as to Count IV and denying plaintiffs' summary judgment motion. The Court further granted summary judgment to Girard Bank and Chase Manhattan Bank, N.A. on all remaining claims. On May 28, 1980 judgment was entered and a memorandum was filed.

A trifurcated jury trial (liability, damages and counterclaims) against all remaining defendants commenced on June 2, 1980 before The Honorable Clifford Scott Green. Plaintiffs' case rested after eighteen days of testimony and the submission of over 150 exhibits. On June 30, 1980 the Court granted the Rule 50 motions of all defendants for a directed verdict on both the federal and pendent state claims.

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*Defendant Firestone had previously alleged in a state court action that Tose had committed certain unspecified financial wrongs as to his limited partnership interest. This claim was settled, discontinued and ended.

The trial on the Forstater counterclaims began on June 30, 1980. On July 10, 1980 the jury found for Tose, the counterclaim defendant, on two contract claims unrelated to plaintiffs' case in chief and on the defamation claim. The jury also awarded Forstater $69,166.67 on an alleged oral employment contract between Forstater and the Eagles. Judge Green subsequently denied Forstater's motions for judgment notwithstanding the verdict on Counts I and IV of his counterclaim and for a new trial.

Plaintiffs filed a timely appeal to the Court of Appeals from:

1. Order of May 16, 1980, granting summary judgment in favor of Girard Bank and Chase Manhattan Bank, N.A. on all claims alleged in plaintiffs' Amended Complaint;

2. Orders of May 16, 1980, granting summary judgment in favor of all bank defendants on Count IV of the Amended Complaint alleging a conspiracy to fix prime interest charges;

3. Order of June 30, 1980, granting directed verdicts in favor of all defendants on both federal and pendent state claims; and

4. Judgment in favor of Forstater on Count III of the Counterclaim in the amount of $69,166.67.

On April 30, 1981 the Court affirmed the District Court in all respects, and denied rehearing on May 22, 1981.

B. Statement of the Facts.

First Pennsylvania Bank, N.A. ("FPB") loaned Leonard Tose and the Philadelphia Eagles $10,500,000 in 1969. By June 30, 1977, the loan had been paid down to approximately $5,300,000 and interest payments over the period had totaled approximately $6,000,000. Principal and interest had always been paid on time, and on June 28, 1977,

the bank was holding $1,250,000 of Eagles' money from pre-season sales, which it had promised in writing to re-lend for operating capital. Despite this past record of repayment, on Thursday, June 28, 1977, Tose and his lawyer Edwin P. Rome, were summoned to a showdown meeting at 4:30 p.m. in the office of FPB Chairman John Bunting, and were peremptorily ordered by Bunting to install Sidney Forstater, a known disloyal employee of Tose and the Eagles as chief executive officer of the Eagles over Leonard Tose by the following morning *or else*:

1. the Eagles-Tose loans would be called [bank lawyers had advised FPB in the previous week that there was no legal justification for calling these loans];

2. the Eagles and Tose would be given until 9:00 a.m. the next morning to pay $5.3 Million;

3. the Eagles' advance ticket money of $1,250,000 which the bank was holding would not be loaned back to the Eagles, as promised in writing, as a result of which all Eagles' checks, beginning the next day and including payroll checks to be issued the following Monday, would bounce.

Although Mr. Bunting knew that FPB's precipitous actions in pressuring the Eagles and Mr. Tose may have been unlawful, he asserted that before Mr. Rome could do anything about it, "we are going to kill you". When Mr. Rome requested two weeks grace before installing Forstater in order to secure replacement financing, Mr. Bunting not only denied the request but stated "I'll bury you. I'll make sure that you don't get financing from any bank in the City of Philadelphia. . . . I'll make sure you don't get financed by any bank in the country".

This extreme and unusual banking behavior was not the product of impulsive aberration but was according to a written plan. Earlier the same day, Bunting, Pemberton and

Hayes (a FPB Vice President) had agreed on the strategy for the meeting.* According to an internal FPB memorandum this strategy was set forth in a document which its author, Hayes referred to as "the original game plan". The "game plan", a most remarkable document, is a plan "to squeeze out Tose in favor of Barness", as one bank defendant put it. This unusual memorandum, dated March 24, 1977, addressed to FPB Chairman Bunting by vice-president Hayes concludes with a five point "plan of action" as follow:

> "1. The meeting will be held with Leonard, and our demands will be presented to him.
>
> 2. He will take the alternative of replacement financing and we will give him thirty days to accomplish this.
>
> 3. Immediately after our meeting with Tose we should meet with Herb Barness and explain our plan, and try to get Barness to talk to Pete Rozelle to explain his position. Our counsel feels that this contact with Rozelle is critical, and will be very important if we have to force the sale of the Club. Gil Oswald feels that Pete Rozelle might even put the pressure on Tose if he knew the seriousness of this situation because he doesn't want the Eagles Franchise looking like a World Football League franchise.
>
> 4. When Tose can't find financing the Bank should contact Rozelle and indicate that we are going to take action against Tose and the club.
>
> 5. The rest will depend on Rozelle's reaction to the pressure from Barness and the Bank.

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*FPB prepared, prior to the June 28, 1977 meeting with Tose and Rome, an internal memorandum summarizing a three point program for the meeting which included the calling of the loan, the installation of Forstater, and the refusal to re-lend ticket funds on hand.

GAH:dw

cc: George A. Butler, Vice Chairman
Cameron S. Clark, Executive Vice President
Joseph T. Drennan, Senior Vice President
Stuart B. Andrews, Vice President''

This ''plan of action'' had emerged from a meeting of the Bank's highest executives in Mr. Bunting's office on March 21, 1977, was drafted at Mr. Bunting's direction, had been discussed with counsel, who advised Hayes that there was no basis for calling the loan* and was preceded by two drafts. Once again, immediately before the July 28th showdown meeting, the Bank's officers were advised by their lawyers, according to Hayes, that there was no substantial default that would justify calling the loan.

On July 29, 1977, in the early afternoon, Leonard Tose, with no practical alternative, surrendered to FPB and the Bank took over the Eagles in a formal ceremony installing Sidney Forstater as Chief Executive Officer. Unbeknownst to Tose, Forstater had met secretly with the bank officers earlier in the day. Help from Tose's colleagues in the NFL averted successful completion of FPB's plan and on August 10, 1977 an unexpected rescue from a Detroit bank permitted Tose to pay off the FPB loan and fire Forstater. In the process Tose sustained substantial damage, an issue which was reserved for the second phase of the aborted trial.

The specific roles played by Barness, Firestone and Forstater in FPB's plan of action to oust Tose, as set forth in the FPB internal memorandum of March 24, 1977 are as follows:

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*The loan, a term due to be paid off in full in September 1979, more than two years later, was then current as to interest and principal, and always had been.

In June 1976 Barness, then a limited partner of Tose in the Eagles partnership, had importuned Tose to give him a right of refusal to buy Tose's controlling interest, which Tose did (A-XIII. 3278-87). Although Barness had discussed selling his interest to Tose, he in fact desired to buy Tose's interest, and in June 1977 he offered Tose $21,500,000 for his interest, which Tose rejected (A-X. 2484, 2520). Armed with his right of first refusal, Barness had previously begun to undermine Tose in June 1976 by criticizing him to Eagles general manager Murray. He then broke openly with Tose, demanding to see the books (A-XIV. 15, A-II. 386-390).

After the open break Barness campaigned to persuade John Firestone, another limited partner in the Eagles, to join forces with him to oust Tose. Firestone kept pencilled notes of telephone conversations with Barness in October 1976 in which Barness advocated they join together in "throwing Leonard out as general partner", and that each of them should sue Tose as part of that plan, which they both subsequently did. The notes also contain their agreement to conceal from Tose that the owner of the Philadelphia 76ers professional basketball team was interested in buying the Eagles (A-II. 389).

After he had persuaded Firestone to join forces with him, Barness continued his efforts to apply pressure on Tose from other directions. He contacted FPB through Hayes and demanded that Hayes take "corrective action" against Tose. On December 2, 1976, Barness threatened to sue Tose if he did not place Sidney Forstater in charge of the Eagles financing.*

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*Barness had another contact with FPB through his neighbor, Charles Barndt, with whom Barness served on the Bucks County Industrial Development Corp. Mr. Barndt was employed by FPB as an assistant to John Bunting.

Forstater had left the Eagles' employ in June 1976 after Tose rejected his demand for a $1,000,000, 7 year contract with extravagant fringe benefits, and thereafter acted as a consultant for the Eagles on a part-time basis. During the period he had been employed by the Eagles, Forstater had worked with Hayes for several years and maintained a close relationship with him after his consulting business was established.

On March 16, 1977, Hayes met with Forstater. Hayes had previously had several discussions with Barness. On March 17, 1977, one day after his discussion with Sidney Forstater, Hayes proposed in the initial draft of his March 24, 1977 memo that Forstater be appointed the chief executive officer of the Eagles.

Even before the memorandum of March 24, 1977, Forstater had voiced criticism of Mr. Tose to the representatives of FPB. He also criticized Coach Vermeil to the bank, telling Hayes that Vermeil had too many assistant coaches and that his salary was excessive. He discussed with Hayes the possibility that Barness would wind up owning the Eagles, and that it would be better if he did. When the bank told Forstater that Barness was threatening legal action for a receivership against Tose, Forstater did not report this to Tose, despite the fact that at that time he was a trusted consultant to Tose and the Eagles, receiving half his income from the Eagles.

On March 26, 1977 Hayes, Butler, Bunting, Tose, Rome and Forstater met at the bank and discussed a new loan to Tose of approximately $4 Million to enable Tose to buy out Barness. FPB's price for granting the new loan was to exercise tighter financial controls. Tose responded that he would accept as financial officer of the Eagles whomever Touche Ross, his accounting firm, recommended.

On April 25, 1977 Pemberton told Rome, Forstater and Hayes that rather than select a new financial officer, FPB wanted Forstater to continue for an interim period. At this meeting, Rome told Pemberton that although Forstater had been a long time employee of Tose, the relationship was not what it had been and Tose wanted Forstater replaced as soon as possible.

During May and June 1977 Forstater, Pemberton, Hayes, and Lusen (another bank employee) drew a game plan to harass Tose, which included firing Tose's executive secretary and requiring Forstater to countersign all checks. On June 17, 1977 Hayes and Forstater discussed ways to pressure Tose, Pemberton knew that "they [Hayes and Forstater] were collecting things that might get Mr. Tose's attention and cooperation". Immediately after June 17, the pressure moves described in Hayes' memo entitled "Points Discussed with Sidney Forstater on 6/17/77" were implemented.

After March 24, 1977 Barness also escalated the hostilities toward Tose. On April 1, 1977 Barness met privately with Bunting and discussed Tose's proposed purchase of his partnership interest in the Eagles. This meeting was in direct contradiction of Bunting's previous agreement with Rome not to discuss the Eagles business with Barness. On April 12, 1977 Rome accused Bunting of bad faith in disclosing confidential customer information to Barness, an accusation that Pemberton privately told Rome was merited. Barness met again with Bunting on June 13, 1977 and on July 19, 1977 they spent 5 hours together playing golf at Barness's home.

These antecedent events culminated in the showdown meeting of July 28, 1977 and the bank take-over with Forstater positioned as CEO. The take-over lasted until August

9, 1977 when the Detroit bank purchased the Eagles loan from FPB.

The Detroit loan was short term "bridge-financing", a six month loan in order to buy time for long-term financing. Between July 29 and March 1, 1978, when Citibank finally granted financing to Tose and the Eagles, defendants Bunting, Barness and Pemberton had contacts with various banks considering replacement financing to the Eagles. As a result of these and other contacts by FPB, Bunting and Barness, certain banks refused to deal with the Eagles after informal positive assurances had been given and other out-of-town banks were discouraged from participating in financing the Eagles. The banking boycott, which Bunting had plainly threatened and which Barness actively encouraged, involved PNB, Provident, Chase and Girard.

On the question of whether the banking respondents had an opportunity to meet often, there was substantial testimony relating to the Philadelphia Clearing House. This organization is a private, tightly-controlled membership club. The existing members determine whether any new members shall be admitted. It meets regularly each month. The chief executive officer of PNB called it "an anachronism" yet senior officers, including some Chief Executive Officers, regularly attended, and formal minutes were kept. In the critical years of 1977 and 1978, John Pemberton was presiding officer of the Clearing House. He thus had ample opportunity to transmit to senior bank officers Mr. Bunting's threat to organize a banking boycott against Tose and the Eagles. Considering the extensive publicity and interest the Eagles loan generated, a fact-finder could reasonably infer that Pemberton discussed the Tose affair with his colleagues at the Clearing House. During the period of the "take-over," between July 29 and August 10, 1977, Pemberton personally dissuaded Citibank from rescuing the Eagles and

Tose and it would be less than natural for Pemberton not to have told his Philadelphia colleagues at least what he told a New York banker. Viewed collectively, the testimony on the Clearing House, with all of the other evidence of collaboration dictates that plaintiffs' banking boycott claim should have been submitted for the jury's consideration.

Both respondents and petitioners filed motions for summary judgment on Count IV of the Amended Complaint, which charges a conspiracy to fix the prime interest rate in Delaware, Montgomery, Bucks and Philadelphia counties.

The facts are easily summarized: (1) Prime interest rate changes from 1973 to 1978 by all defendant banks were made almost always on the same day to identical levels; (2) senior officials from defendant banks met regularly, about once a month, under the auspices of the Philadelphia Clearing House Association; (3) defendants' cost of doing business and cost of "buying" money were different; and (4) all defendant banks constantly participated with all other defendant banks in hundreds of contracts for billions of dollars involving joint loans. Each bank followed the prime interest rate changes of each other bank on some joint loans, and correlatively was followed by all the other banks on other joint loans. Each bank's change in prime interest rate not only affected its own revenues, but the revenues of every other bank as well.

The trial court granted respondents' motions for summary judgment and denied petitioners'. In doing so, it apparently relied on *Broadcast Music, Inc. v. CBS*, (441) U.S. 1 (1979), stating that "since the practice of banks entering into a joint or participation loan agreement at a set interest rate is not one which has been scrutinized by the courts, it would not be appropriate to automatically classify the practice as a *per se* violation of the Sherman Act". But this rationale misses the point. Petitioners did not argue that a

bank cannot pool its resources with other banks to make loans that might be beyond its capabilities; but rather, when those loans are made on a movable or variable prime interest rate basis, the rate charged the customer must be the bank's and not some competitive bank's.

It could very well be that the trial court was unduly apprehensive about the serious implications of finding so widespread a practice illegal *per se*. However, there are judicial methods at hand to soften the repercussions, *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) by making the decision prospective after this case.

Petitioners obtained through discovery a plethora of written agreements signed by Provident, First Pennsylvania Bank, PNB, Chase, and Girard, among others, on joint movable "prime-plus" loans totalling billions of dollars (over a series of years) in which each bank had agreed to use the prime interest rate of another rather than its own on the portion of the money loaned by it. In the typical situation the lead, or "agent", bank sets the changeable prime interest rate which the others charge for their portion of the loan. Each of the banks has had an opportunity to be the lead or agent bank on many of these huge loans, so that a constantly revolving cluster of agreements finds each respondent bank agreeing in writing to charge another respondent bank's prime interest rate.

Typical of this arrangement is the $50,000,000 revolving loan which is summarized in an internal memorandum secured from the files of First Pennsylvania. It is an interoffice memorandum disclosing that two respondents, First Pennsylvania and PNB, accounted for approximately 40% of the total of $50,000,000, and that all of the participating banks agreed to charge not their own but First Pennsylvania's changing prime interest rate. Moreover, the memorandum discloses that the common "rate structure" in the

agreement was the product of pre-contract negotiations between First Pennsylvania and PNB.

First Pennsylvania internal documents disclose seven such joint loans. The loans total in excess of $210,000,000. Not only do they involve agreements to follow another's prime interest rate, depending on which bank is the lead bank, but they show extensive collaborative action between leading officers of the defendant banks and others to create and monitor the transactions. In the circumstances these "follow-the-leader" prime interest rate changes afford striking evidence to explain the identity of prime interest rate changes made by appellee banks from 1973 through 1978. It is the petitioners' contention that the cumulation of this evidence not only demanded denial of the motions for summary judgment, but required summary judgment on this particular issue in their favor.

The Eagles-Tose loan, from 1969 to August 9, 1977, was a "prime-plus" loan. Thus, to the extent that the prime interest rate was fixed artificially by reason of the foregoing, Tose and the Eagles were directly affected. It matters not that the Eagles-Tose loan was made by a single bank, since the prime interest rate charged was artificially affected by all of the collaborative activities of the defendant banks.

The Pennsylvania respondent banks, together with Fidelity, constitute the five largest banks in the four counties, and Chase has admitted that its loans in the four counties amounted to approximately $300,000,000 per year, and that it had correspondent banking relations with all of the Pennsylvania respondents. Since these facts are admitted, the only unresolved issue is whether the banks enjoy an as yet unspecified exemption or immunity from the application of the Sherman Act. Respondents did not even attempt seriously to argue that the facts here do not fall within the confines of *Socony* or *Container*. They simply argue that joint loans

are necessary and widespread, but nowhere do they explain why a participating bank must charge some other bank's prime interest rate instead of its own.

Typical of the cartel-like, joint activities of respondent banks is a multi-million dollar loan entered into between First Pennsylvania, Girard and other banks including Morgan Guaranty. A fair summary of this transaction follows:

The loan to a First Pennsylvania customer involved $30,000,000 for ship construction. Three meetings were held in New York at the office of Morgan Guaranty attended by officers of First Pennsylvania, Girard, Morgan, Montreal and Chemical. The so-called competitive banks in this case agreed to charge their customers the rate established by London Interbank Offering Rate, but the rate was determined by the ability of each to buy in the open market. At the private meetings in new York, Girard protested that it was not able to buy as sharply and advantageously as Morgan, and insisted that the proposal should be changed to provide that the London rate should be the average of Morgan's, Girard's and Chemical's on the London exchange. (Note the characteristic cartel trait of accommodating the less efficient supplier.) The Girard proposal was accepted and became the critical standard in the written contract, and First Pennsylvania agreed with Girard and signed the contract on that basis.

Both Hayes and Bunting admitted what is obvious: namely, that on all joint loan contracts the participating banks must collaborate in the pre-contract stage in administering the contract.

The District Court's opinion assumes that plaintiffs are challenging joint or participating loans as such. On the contrary, plaintiffs object not to the existence of joint loans, syndicated loans or participations, but the express cov-

enants by participating banks to follow each other's prime interest rate. It is not unusual in any industry that some customers demand more than one supplier, whether the industry be oil, steel, chemicals or airplanes. What is unique in the present case is the element of following a so-called competitor's price.

REASONS FOR GRANTING THE WRIT.

The reasons for granting this writ can be concisely summarized as follows:

(1) The Court of Appeals ruled on summary judgments and directed verdicts so that the factual issues are graphic and simply stated;

(2) The issues involved are important under the Sherman Act, 15 U.S.C. 1 and the Bank Holding Company Act, 12 U.S.C. 1972(1)(C) and there is substantial inter-circuit and intra-circuit conflict on them;

(3) This Court has not acted on the 1970 amendments to the Bank Holding Company Act, and the lower courts are becoming inordinately restrictive about them;

(4) An aphorism in this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) is being distorted to nullify *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and other established Supreme Court decisions resulting in summary rejection of claims by independent businessmen whose elimination is not deemed to affect "competition" but only a "competitor".

(5) The Sherman Act in relation to banking practices is urgently in need of clarification;

(6) The law relating to the role of judge as against jury in Sherman Act conspiracy cases is hopelessly confused by this case and cases in other circuits, and

(7) The law of conspiracy in Sherman Act cases is badly in need of that clarification which the unusual facts in this case can graphically elucidate.

An important reason for granting this writ is that this case presents an unusual set of facts which this Court can use as a vehicle to clarify much of the confusion, indeed near chaos, that exists iner-circuit and intra-circuit among the

federal courts on two important federal statutes; namely the Sherman Act 15 U.S.C. 1 and the Bank Holding Company Act, 12 U.S.C. 1972(1)(C), sometimes called the "little Sherman Act" applied exclusively to banks.

Recent decision of this Court have been variously interpreted by too many courts to add impediments to the antitrust plaintiff undreamed of by the framers of the Sherman Act, or by the leading legislators who directly participated in the major amendments to the antitrust laws in 1914 and in our own day.

The issue of "standing" exemplifies the problem. In this case it was introduced on appeal, on the Court's own "discovery", so that no litigant, appellant or appellee, had an opportunity to address it, to brief it or to argue it.

We respectfully invite the Court's attention to an exhaustive research article on the subject of "standing" and the confusion which attends it. "An Analytical Framework for Antitrust Standing", 86 Yale L.J. 809. The authors state what has become a truism among practitioners: "Without adequate guidance from the Supreme Court or from Congress, the lower federal courts have adopted disparate approaches to this question, resulting in sharply conflicting holdings and reasoning". (page 810) The truth of the matter is that the result of any case on this issue may very well depend not on what circuit the plaintiff finds himself, but what panel he draws.

This disarray on the subject has intensified not diminished since 1977 when this in-depth research piece was done.

Moreover an inordinate amount of time is spent these days on litigating just the question of "standing". And more often than not questions of "causation", normally jury ques-

tions (*Continental Ore Company v. Union Carbide*, 370 U.S. 690 (1960) are transformed into "standing" questions, as in this case.

I.

A Conspiracy to Restrict Access to the Credit Market Stands on Its Own; It Does Not Require Additional Evidence That It Affected "Competition" in Some Other Line of Commerce.

The Third Circuit held that a conspiracy to oust a general partner (Tose) of a football team in favor of a limited partner (Barness) is not a *per se* violation of the Sherman Act. However, that was not the issue tendered by the evidence. The issue was whether a conspiracy by a limited partner and a bank to deny credit and to use coercive banking powers for the purpose of ousting the general partner of a large enterprise is a *per se* violation of the Sherman Act. The subject of the conspiracy here is access to the credit market. It stands on its own. The purpose for which the conspiracy is conceived and carried out is irrelevant. It is enough that the credit is impaired. In *Catalano v. Target Sales Inc.*, 446 U.S. 643 (1980), this Court held that an agreement to refuse to grant credit is illegal *per se*. In this case the fact that the agreement was between a bank and non-banking participants to begin with should not matter. *Poller v. CBS, Inc.*, 368 U.S. 464, is often cited for its customary admonition to use summary judgment sparingly. But *Poller* is more than an aphorism in this case. Its factual setting is strikingly similar. The gist of his complaint was that CBS and a rival television station owner conspired to force a distress sale of his station to CBS by cancelling his affiliation. This Court did not require proof of what effect Poller's demise had on competition.

Klor, supra, supposedly established that an antitrust violation is not to be tolerated "merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." In *Radovich v. National Football League*, 352 U.S. 445 (1958), injury to a single athlete was deemed sufficient to sustain an antitrust claim. "Public injury" was rejected as an additional requirement, and the federal courts were told not to add requirements to antitrust claimants not specifically called for by the statute. The decision below is but one in a burgeoning volume of cases where Courts are cutting off claimants for artificial reasons.

The Circuit Court, as so many others, seized upon a now famous sentence in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), to affirm the judgments. In *Brunswick*, competition was not harmed, only a competitor who claimed that a merger revived a failing competitor. This Court stated that the purpose of the antitrust laws is to protect competition, not a competitor. Unfortunately, too many lower courts, including the Circuit Court here, have given it a life of its own by holding that injury to a single trader cannot show injury to competition. The Philadelphia Eagles and Tose were entitled to enter the credit market free from a conspiracy by a powerful banker and a powerful race-track owner to deny credit and exert coercive banking power to oust Tose. *Brunswick* has been interpreted to nulify cases like *Klor*, *Radovich* and *Poller*. Unless this Court places the matter in its true prospective, the trend will go on unabated.

II.

The "Standing" Issue First Raised by the Circuit Court Was in Fact a "Causation" Issue for the Jury.

Petitioners were confronted in the Court of Appeals with an advocate's nightmare; *i.e.*, having to contend with an adverse ruling that was "discovered" by the reviewing court rather than by the trial court or respondents' lawyers. After acknowledging that the trial court would have committed error in granting summary judgment if petitioners had "standing" (page 36, footnote 20), the Court determined that petitioners lacked the requirement. The argument is that assuming that the banks' numerous agreements to follow each other's prime rate changes to be illegal *per se*, petitioners produced no evidence that those price agreements had a damaging impact on the prime rate when used for single loans as against joint loans. But the prime rate is the prime rate for all loans, and is analytically indivisible. Moreover, the ruling was made by the trial court on summary judgment on another ground. It is manifestly unjust for the Circuit Court to affirm on another ground without granting the opportunity to meet the new requirement. Actually we are not speaking of "standing" here at all, but of causation. The identical question was squarely posed in *Continental Ore, supra*, where the Court of Appeals for the Ninth Circuit "discovered" a ground to defeat the appellant not used by the trial court. It found no evidence of causation. This Court in reversing, held that where the proof of restraint disclosed acts having a tendency to cause damage, the question of whether the claimed damage was caused by those acts belonged constitutionally to the jury, not the Court. Furthermore, the indirect price-fixing cases (*Container and*

Socony)[1] involved an inference that the acts used to stabilize prices indirectly, actually did. In *Container* an agreement to exchange prices sporadically was held to be a *per se* price-fixing agreement. This arrangement seems infinitely more attenuated than the numerous agreements on prime rate on joint loans involving billions of dollars which were consummated during the same period as the prime plus Tose-Eagles loan. In any event, *Continental Ore, supra* makes the question of causation a jury issue.

III.

The Bank Holding Company Act Claims.

Petitioners sought relief based on the Bank Holding Company Act, 12 U.S.C. 1972(1)(C). The Circuit Court made the subtle distinction between saying that the refusal to finance Tose and the Eagles may have been caused by a "hidden agenda" to force a distress sale but was not "conditioned" upon the consummation of that agenda. It seems to us that failure to lend money to the Eagles because of a "hidden agenda" to force a distress sale of Tose's interest is tantamount to "requiring" that as a "condition". In any event, the 1970 Amendments to the Bank Holding Company Act, "the little Sherman Act," have not been reviewed by this Court. The restrictive ruling adopted below is a good reason for granting this writ.

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[1] *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *U.S. v. Container Corp.*, 393 U.S. 333 (1969).

CONCLUSION.

The issues presented are substantioal and of great legal importance. It is respectfully submitted that this Petition for Writ of Certiorari should be granted to review the judgments and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A.

Opinion of the Court of Appeals.

United States Court of Appeals, for the Third Circuit. Nos. 80-2123 and 80-2334.

Tose, Leonard H., Philadelphia Eagles Football Club, Tose, Inc., Appellants in No. 80-2123, v. First Pennsylvania Bank, N.A.; Bunting, John R.; Pemberton, John C.; Barness, Herbert; Forstater, Sidney; Provident National Bank, Chase Manhattan Bank, N.C., Girard Bank, Philadelphia National Bank, and Firestone, John D.

Tose, Leonard H., Philadelphia Eagles Football Club, Tose, Inc., v. First Pennsylvania Bank, N.A.; Bunting, John R.; Pemberton, John C.; Barness, Herbert; Forstater, Sidney; Provident National Bank, Chase Manhattan Bank, N.C., Girard Bank, Philadelphia National Bank, and Firestone, John D., Sidney Forstater, Appellant in No. 80-2334.

Appeal From the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil No. 78-01499).

Argued March 19, 1981. Before: Aldisert and Higginbotham, *Circuit Judges*, and Markey, *Chief Judge*.* (Filed April 30, 1981).

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* Honorable Howard T. Markey, of the United States Court of Customs and Patent Appeals, sitting by designation.

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ALDISERT, *Circuit Judge*.

The major question for decision is whether the district court erred in granting summary judgments and directed verdicts in favor of a number of institutional and individual

defendants against whom antitrust and other claims had been brought by Leonard Tose, Tose, Inc., and the Philadelphia Eagles Football Club. We also consider issues arising from contractual counterclaims filed by an individual defendant. We find no error in the district court's disposition, and therefore we will affirm.

I.

Appellants filed suit in the district court on May 5, 1978, against appellees First Pennsylvania Bank (FPB), John Bunting, John Pemberton, Sidney Forstater, and Provident, Chase, Girard, and Philadelphia National banks, and against Herbert Barness and John Firestone. An amended complaint was filed by leave of the court on July 2, 1979, setting forth four distinct claims for relief against various defendants: count one, a conspiracy in restraint of trade in violation of §1 of the Sherman Antitrust Act, 15 U.S.C. §1, designed to "force Tose to sacrifice his controlling interest in the Eagles at a price substantially below its true market value," 1 App. 30, and implemented in part by a "banking boycott" against appellants, *id.* 29; count two, a violation by FPB, Bunting, and Pemberton (collectively, FPB appellees) of the Bank Holding Company Act Amendments of 1970, 12 U.S.C., §1972(3) (now §1972(1)(C)); count three, malicious interference and conspiracy to interfere with appellants' advantageous contractual relations and business prospects, causing Tose to suffer severe emotional distress, in violation of Pennsylvania common law; and count four, a "conspiracy to fix interest rates in the four counties of Philadelphia, Bucks, Delaware and Montgomery," Pennsylvania, in violation of §1 of the Sherman Act.[1] 1 App.

[1]Counts one and four alleged violations of both §1 and §2 of the Sherman Act. Appellants do not press the §2 claim on appeal, and we find no evidence in the record to support a finding of monopolization.

34. Appellants reached an amicable resolution of their disputes with Barness and Firestone before trial. Both limited partners sold their Eagles interests to Tose and the action against them was dismissed by stipulation.

On May 16 and 28, 1980, the district court ruled on cross motions for summary judgment, *Tose v. First Pennsylvania Bank*, 492 F.Supp. 246 (E.D.Pa. 1980), denying appellants' motion for judgment on count four and entering judgment in favor of all appellees on that claim. It also entered judgment in favor of the FPB appellees on count two, the Bank Holding Company Act claim, and in favor of appellees Chase and Girard on all claims asserted against them.

Trial on the remaining claims commenced before a jury on June 2, 1980. Appellants presented evidence for fifteen days. At the conclusion of appellants' case in chief the remaining defendants moved for directed verdicts on all counts pursuant to Fed. R. Civ. P. 50. The trial court granted those motions on June 10.

Trial then commenced on a four-count counter-claim filed by appellee Forstater. (Forstater has filed a cross appeal in this court. To avoid confusion, we refer to Forstater as an appellee throughout this opinion, and to Tose, the Eagles, and Tose, Inc. as appellants.) The jury returned a verdict in favor of Forstater on one of the four counts, assessing damages of $69,000 against Tose and the Eagles, and in favor of appellants on all other counts. The district court entered a judgment in accordance with the verdict and sub-

sequently denied Forstater's motions for judgment n.o.v. or a new trial.[2]

Appellants now argue that the district court erred in granting summary judgments and directed verdicts on the antitrust, Bank Holding Company Act, and pendent claims. Appellants also seek to overturn Forstater's $69,000 judgment, asserting that the court abused its discretion by excluding certain evidence and erred in its instructions to the jury. Forstater cross appeals from the denial of this motion for judgment n.o.v. or a new trial on another count of the counterclaim, arguing that he is entitled to judgment as a matter of law under the Pennsylvania Uniform Written Obligations Act, Pa. Stat. Ann. tit. 33, §6 (Purdon 1967), and

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[2]Forstater's motions were filed on July 16 and denied on August 8, 1980. Appellants filed their notice of appeal on July 24, 1980. Appellees have moved to dismiss the appeal for want of jurisdiction, contending that the appeal is barred by F.R.A.P.4(a)(4), which provides that "the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying" a motion for judgment n.o.v. The 1979 amendments to Rule 4(a) provide that "[a] notice of appeal filed before the disposition of any of the above motions shall have no effect."

Appellants plainly failed to satisfy the demands of Rule 4(a). We are reluctant to treat the default as jurisdictional, however, in light of the substantial forfeiture that would result and the absence of any prejudice to appellees resulting from the premature filing. As Judge Van Dusen wrote for the court in *Hodge v. Hodge*, 507 F.2d 87, 89 (3d Cir. 1975), "[s]o long as the order is an appealable one and the non-appealing party is not prejudiced by the prematurity . . . the court of appeals should proceed to decide the case on the merits rather than dismiss on the basis of such a technicality." We have discretion under Appellate Rule 2 to "suspend the requirements or provisions of any of these rules in a particular case . . . on [our] own motion," and we exercise our discretion to waive the Rule 4(a) default in this case. We do so "to relieve litigants of the consequences of default where manifest injustice would otherwise result." Note of Advisory Committee on Appellate Rules, 28 U.S.C.A. following Rule 2. We note also that Forstater's motions could not have led to alteration of the judgments appealed from. *See id.* following Rule 4 (1979 Amendment, Note to Subdivision (a)(4)).

alternatively that there was insufficient evidence to sustain the jury's finding that Tose did not knowingly sign the writing in question.

II.

We review grants of summary judgment and directed verdicts for legal error, testing the record by the same standards as the district court. On summary judgment, we inquire whether the court correctly concluded "that there [was] no genuine issue as to any material fact and that the moving party [was] entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). On review of a directed verdict, we "consider the record as a whole and in the light most favorable to the non-moving party, drawing all reasonable inferences to support its contentions. If no reasonable resolution of the conflicting evidence and inferences therefrom could result in a judgment for the non-moving party," we must affirm. *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 115 (3d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3684 (U.S. Feb. 26, 1981) (No. 80-1458); *see Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 25 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978). We recognize, of course, that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the pilot." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). On the other hand,

> [w]hile we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting

> forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to suipport the complaint.

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968).

III.

Our narrative of the facts is based on the entire record, viewed in the light most favorable to appellants. Because the answers to the legal issues presented by this appeal depend on the factual predicate, it is necessary to set forth a lengthy narrative.

A.

Tose purchased the Eagles football club in 1969, using $1.5 million of his own funds, $10.5 million borrowed from appellee FPB, and $4 million contributed by other investors, including Barness and Firestone. He acquired the Eagles' assets in his own name and then transferred them to a limited partnership of which he was general partner. In 1972 Tose borrowed another $2.7 million from FPB to buy out some of his limited partners. The eagles Partnership defaulted on an amortization payment of $750,000 due FPB in 1974, and the loan agreement was amended in 1975 to adjust the amortization schedule and to limit Tose to a $60,000 annual salary in unprofitable years. At the end of 1975 the Eagles Partnership consisted of Tose, the sole general partner, with approximately a 60% interest; Barness 29%; Firestone, 5%; and another limited partner with about 6%. Tose and Barness agreed in June, 1976, to give each other the right of first refusal should either decide to sell his interest in the Eagles.

Relations among the partners became strained in 1976. Barness began openly criticizing Tose's management of the Eagles and demanded access to the club's financial records. Barness wrote to Tose in September, 1976, accusing him

of "tak[ing] advantage . . . of me and your other partners" and violating the loan agreement with FPB. He asked that Tose have accountants review the club's books for 1969 through 1976 and suggested that Tose make no withdrawals from the Eagles' account until the reviews were completed. 13 App. 3288-89. In a conversation with Firestone in October, 1976, Barness suggested "throwing Leonard out as general partner" as a "last option." 9 App. 2376, 2390. Barness' attorney wrote to one of Tose's attorneys on December 2, 1976, indicating that Barness had "agreed to give [Tose] a reasonable period of time to produce a purchaser for his interest *provided* that [Tose] agreed to certain guidelines in operating the team" until a purchaser was found. Among the "guidelines," Barness demanded that appellee Forstater, who was then a part-time consultant to the Eagles,[3] be given control of all financial matters and be required to submit monthly reports to Barness. 2 App. 256-58.

B.

Barness met with Gerald Hayes, an FPB loan officer, in late 1976 and again early in 1977. On both occasions Barness expressed dissatisfaction with the Eagles financial management and threatened to go to court to seek appointment of a receiver. Hayes testified that he told Barness the bank was not "prepared to do anything" until it received pending financial statements. 11 App. 2767. Hayes called Forstater, his "contact" with the Eagles, to discuss his meetings with Barness; and Forstater echoed Barness' criticisms of Tose's management.

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[3]Forstater, a certified public accountant since 1950, had been a full-time employee of Tose and his various enterprises from 1966 to 1976. He left that position sometime in 1976 to "go intoi the consulting business." 4 App. 1012, but he continued to work part-time for the Eagles.

The Comptroller of the Currency reviewed FPB's loan portfolio at the end of 1976 and rated the Eagles loan "substandard." The Eagles' accountants notified the Eagles early in 1977 that they could not complete their financial statements for 1976 unless FPB waived several defaults under the loan agreement. In March, 1977, FPB received draft financial statements from the Eagles, which indicated a loss for the year of $1.15 million. On March 17, Hayes sent a memorandum regarding the Eagles to his superiors at FPB. Appellee Bunting, then Chairman of FPB, asked Hayes on March 21 to prepare a second draft of the memorandum to prepare him for a meeting with Tose. Hayes produced another draft dated March 24, 1977. That document is central to appellants' case.[4] It "recommended a meeting with Leonard Tose where the bank would deliver a list of terms under which we would continue to provide financing to the Eagles." 2 App. 272. Hayes stated six reasons for this recommendation, including defaults on terms of the loan agreement, ineffective financial management of the Eagles, the 1976 losses, a projected failure to pay $500,000 due on May 31, 1977, and increasing obligations to players. He recommended that FPB require Tose to relinquish all financial control over the Eagles, give up the power to sign Eagles' checks, and retain a chief executive officer acceptable to the bank who would have complete decision-

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[4]Appellants describe the March 24 memorandum as "one of the most remarkable documents in the history of antitrust litigation." Brief for Appellants at 4. Appellee Pemberton, who first saw the memorandum on April 6, 1977, testified that he was "surprised" and "appalled." He stated that "in my mind it appeared to be an effort to be too tough on the borrower and it appeared as if the only way that he could comply with what I consider to be the demands would be to sell the club." 7 App. 1615.

making power over the club's finances.[5] He anticipated that Tose would refuse the demands and seek to re-finance the loan at another bank, and he recommended that FPB allow him thirty days to find as new lender "and advise him that we are prepared to make demand on our loan agreement against the Eagles and against Tose personally." *Id.* 273. The memorandum concluded with a projected sequence of events that would follow implementation of the recommended "plan of action":

> 1. The meeting will be held with [Tose], and our demands will be presented to him.
>
> 2. He will take the alternative of replacement financing and we will give him thirty days to accomplish this.
>
> 3. Immediately after our meeting with Tose we should meet with Herb Barness and explain our plan, and try to get Barness to talk to Pete Rozelle to explain his position. Our counsel feels that this contact with Rozelle is critical, and will be very important if we have to force the sale of the Club. [Counsel] feels that Pete Rozelle might even put the pressure on Tose if he knew the seriousness of this situation because he doesn't want the Eagles Franchise looking like a World Football League franchise.
>
> 4. When Tose can't find financing the Bank should contact Rozelle and indicate that we are going to take action against Tose and the Club.
>
> 5. The rest will depend on Rozelle's reaction to the pressure from Barness and the Bank.

Id. 274.

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[5]Hayes' March 17 memorandum recommended that Forstater be designated for this position, but Bunting instructed Hayes not to name Forstater in his second draft because he thought Forstater "was working with . . . Tose and . . . [was] his best friend." 9 App. 2203.

Bunting and FPB initially took a gentler approach than Hayes had recommended. At a meeting on March 25, described by Tose at trial as "cordial," 10 App. 2585, Bunting proposed that Tose either agree to tighter financial controls or consider finding another lender; and Tose responded by indicating he would welcome tighter controls if FPB agreed to additional advances (projected at between $2 million and $5.5 million) to enable him to pay some other loans and to buy out Barness. The meeting ended with an agreement in principle to go forward on a plan for increased financing and tighter financial controls, including appointment of a controller to be recommended by the Eagles' accountants.

This agreement was never implemented. FPB made no more loans to Tose or the Eagles, and it regarded the financial controls that were installed as unsatisfactory Negotiations between FPB and the Eagles continued through the spring and into the summer of 1977, growing increasingly acrimonious. Edwin Rome, Tose's attorney, met with Bunting and others on April 12 and learned that Bunting had discussed the agreement with Barness despite an express promise on March 25 not to do so.[6] Rome told Bunting that he was "shocked" because he "thought it a breach of a fiduciary duty on the part of Mr. Bunting to have talked with Mr. Barness not only contrary to his word to me, but contrary to his obligation owed to a customer of his bank." *Id.* 2476-77. Rome again met with Bunting and other bank officers on April 25, and he agreed to recommend that Tose retain Forstater as controller for a transitional period, until an outside controller could be chosen and could become familiar with the Eagles' operations. Rome indicated, how-

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[6]Rome explained at trial that he did not want Barness to learn that FPB was planning to lend Tose money to purchase Barness' interest because he was concerned that Barness would then "increase his demand as to a purchase price." 10 App. 2474.

ever, that the Tose-Forstater relationship was "not what it had at one point been" and that "Mr. Tose would want to replace Mr. Forstater as soon as possible." *Id.* 2482.

Relations between the Eagles and FPB continued to deteriorate. Appellee Pemberton, then vice chairman of FPB, spoke with a lawyer in Rome's firm on June 7 and stated "that the Bank was withdrawing its commitment to advance funds in view of the total failure of cooperation from [Tose], the failure to conform to proposals made by the Bank for limitation of expenses, and the failure to sign the Forstater Employment Agreement." 2 App. 290. After some discussion Pemberton "quieted down . . . and said that he would be willing to have a meeting although he wanted it understood that [Tose's lawyers] should advise [Tose] of the Bank's intentions." *Id.* 291.

Hayes met with Forstater on June 17. Hayes testified that he "was trying to develop a series of things that I could use in order to pressure Mr. Tose [into] getting the financial controls that we were trying to establish." 11 App. 2840. He acknowledged that he told Forstater that he was trying to develop a plan to "pressure" Tose, and he stated that Forstater "cooperated and answered all of my questions." *Id.* 2842.

On June 21, FPB's attorney sent Tose's attorneys a formal demand that Tose repay $20,000 to the Eagles and withdraw no additional funds for his personal account. (The loan agreement permitted Tose to draw $60,000 per year, and the letter alleged that he had taken $80,000 in the first six months of 1977.) The letter also advised Tose's attorneys that any checks drawn to cash or for Tose's account would not be honored unless countersigned by Forstater. On July 22, Pemberton wrote Tose to advise that FPB was no longer considering increasing the loans, stating as "principal reasons":

1. Failure to conclude negotiations with present limited partners of the Club.

2. The length of time that these negotiations have dragged on with no visible progress.

3. Failure to implement the cost reduction program which you had verbally agreed to carry out.

2 App. 299.

The Eagles-FPB controversy finally came to a head at a "showdown" meeting on July 28, 1977. Tose and Rome met at the bank with Bunting, who confronted them with an ultimatum. Bunting announced that he would "call" the Eagles loan as of nine o'clock the next morning[7] unless Tose agreed to step down from his management position and install Forstater as chief executive and financial officer of the Eagles. 10 App. 2483-85, 2595. Rome attempted to persuade Bunting to allow Tose a reasonable period to find other financing, as the parties had discussed on March 25, but Bunting refused, saying, "You have the money in" by nine o'clock or "we're taking over the Eagles." *Id.* 2596. Rome objected that the Eagles loan was not a demand loan but was due to be paid later that year. Bunting turned to Tose and said, "Well, you have Ed Rome here as your lawyer and he can take us into court, I know, and you might win. But that's going to take a long time. And in the meantime we are going to kill you." *Id.* 2486. Tose "tried to say several things" but was interrupted by Bunting, who

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[7]Bunting also stated that he intended to ignore a written commitment to lend to the Eagles $1.25 million in receipts from advance ticket sales, which had been paid to the bank to reduce the principal of the loan and thereby to reduce interest payments. The bank had agreed to relend the ticket money for the Eagles' operating expenses. *See* 2 App. 288-89. Appellants state that if FPB had breached this agreement, "all Eagles checks, beginning the next day and including payroll checks to be issued the following Monday, would [have] bounce[d]." Brief for Appellants at 3.

stated, "I'll make sure that you don't get any financing from any bank in the City of Philadelphia. . . . I'll even go better than that. I'll make sure you don't get financed by any bank in the country." *Id.* 2594-95.

Immediately after the showdown meeting Tose instructed Rome to agree to the bank's demands. A meeting was held at the Eagles' Veterans Stadium offices the next afternoon, July 29. Pemberton read from a document describing Forstater's duties as chief executive and financial officer of the Eagles. Pemberton also assured Eagles representatives that the bank would not interfere with the Eagles' football program.

C.

Tose quickly began negotiations aimed at securing replacement financing. On August 8 he agreed to terms for a short-term (six months) loan from a Detroit bank, which bought out the FPB loan. Tose immediately discharged Forstater and resumed control of the Eagles' operations. At a press conference on August 10 he criticized Bunting, Forstater, and others for participating in the brief takeover. He spent much of the ensuing months attempting to arrange long-term financing. During that period he negotiated with appellees Provident, Girard, Chase, and Philadelphia National, but none agreed to grant a loan. On March 1, 1978, Tose and the Eagles closed long-term loans with Citibank of New York. Appellants sought to prove at trial that each of the appellee banks joined with FPB in a banking boycott, designed to deny Tose and the Eagles access to the credit market, between July 29, 1977, and March 1, 1978.

In early August, before the Detroit bank agreed to a short-term loan, a Citibank officer contacted Hayes of FPB with a credit inquiry. Hayes reported, *inter alia*, that "[d]ifficulties [had] arisen among the [Eagles] partners, basically con-

cerning Tose's lack of cost consciousness," and that "[u]p until two years ago the franchise was operating quite profitably but due to increased salary costs and the lack of controls over costs, the club has slipped into the red." 2 App. 309. Pemberton later called the same bank officer "to make sure that [he was] aware of certain facts and details in addition to those discussed with . . . Hayes." *Id.* The officer did not discuss the matter with Pemberton because Citibank already had decided not to meet with Tose and considered the question closed. Another Citibank officer telephoned Bunting with a credit inquiry in December and was told, "we couldn't control Tose and he has debts all over the country. He is a high spender — a big liver — I wouldn't go near him with a 170 [foot] pole. He has a horrible credit background. I suggest you exercise caution in any dealings with him." *Id.* 312.

E.

Appellee Philadelphia National Bank (PNB) was asked to participate in a syndicated loan to Tose and the Eagles on several occasions between July 29 and March 1. The first inquiry came from a Belgian bank in early August. The Belgian bank contacted PNB through its London subsidiary, requested background information on Tose and the Eagles, and asked PNB to participate in a joint loan. An officer of the London subsidiary passed the request along to PNB Senior Vice President Anthony Newton. Newton discussed the proposal with two other PNB vice presidents who had responsibility for loans. All three "felt very negative about the proposal" because the FPB-Eagles situation had "received a great deal of very negative publicity very recently." 2 App. 392. Newton reported to his London associate, who in turn advised the Belgian bank, that PNB was definitely not interested in participating in the loan and that the Belgian bank should "walk very carefully" if it participated. 4 App.

801-02. Newton explained that PNB was not interested in an Eagles loan because Tose "had a reputation as a dissipated playboy," because of publicity regarding the FPB loan, because "there was a suggestion that [FPB] might have to step in to manage the Eagles," and because "the feeling was that the Eagles were in financial difficulty and possibly Leonard Tose as well." *Id.* 801.

In December, 1977, or January, 1978, Charles Sullivan, an attorney who represented the National Football League, telephoned PNB Chairman Morris Dorrance to ask whether PNB would consider participating in a loan to the Eagles. Sullivan pointed out that additional television revenues, which could be assigned as collateral for a loan, would soon be made available to the Club by the NFL. Dorrance considered the inquiry but called Sullivan thereafter to decline. Dorrance testified at trial that he made a policy decision not to finance Tose or the Eagles without "look[ing] at [the proposal] to determine if it was sound." *Id.* 1048. He testified that he objected to the loans because of PNB's philosophy, that a banking institution "ought not to be the focus of controversy. . . . in the public light." *Id.* 1052. He also commented that "Mr. Tose was making some strong accusations about who had done what to whom. And that's not the kind of customer relationship that I am interested in." *Id.* 1036. Dorrance did concede in his conversations with Sullivan that the NFL's promise to provide additional revenues from television was "a very solid commitment and, therefore, financible." *Id.* 1049. Dorrance and Newton both testified that they decided to reject the inquiries independently, without communicating with officials of other banks and without specific knowledge of the Eagles' and Tose's applications at any other bank.

F.

In November, 1977, Pittsburgh Steelers President Dan Rooney and his attorney contacted Harold Kline, Executive Vice President of appellee Provident, to seek financing for Tose and the Eagles. Kline promised to consider the applciation on its merits. He met with Tose on December 9 and with Sullivan on December 14, 1977, to discuss the application.[8] Sullivan gave Kline a memorandum summarizing the loan proposal, which indicated that the NFL would agree to pay $1.5 million per year in television revenues directly to the bank, and that it would agree to "assume responsibility for selling the Club" to "a purchaser who agrees to satisfy any outstanding partnership and personal indebtedness" in the event of a default. 2 App. 436. Negotiations between the Eagles and Provident continued through December and into January. Kline prepared a draft commitment letter setting out terms of a projected agreement on January 19 and submitted it to the bank's counsel later that month. The Eagles opened a "lock box" account at Provident. Top bank officers regarded the loan as "doable" [do-able]. 4 App. 930, 943.

On December 27, 1977, Louis Goffman, a Philadelphia lawyer and a Provident director, advised Provident Chairman Roger Hillas that his law firm represented Barness in team-related litigation against Tose. Goffman had previously learned through his board membership that the bank was negotiating with Tose and the Eagles. After talking to Hillas, Goffman arranged a meeting between Hillas and Barness on December 29. Hillas testified that Barness ex-

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[8]Kline testified that on December 9 Tose indicated that he "had a commitment at that time for refinancing," and that he wished Tose well and stated that "if for any reason he should want to come back to Provident" the bank would be willing to reopen discussions. 12 App. 3165-66.

hibited no hositility toward Tose, notwithstanding the litigation. Both testified that Barness encouraged Provident to lend money to the team but was concerned about the possible impact on his interests of a personal loan to Tose secured by the team. Both testified also that the bank did not agree to condition the loans on Barness' approval, and Barness stated that he did not request any commitments from the bank. Tose met with Kline and others on January 26, 1978, to review Tose's personal finances. Kline testified that he stated at the meeting that "all paperwork . . . would have to pass muster" with the bank's attorney because the bank wanted to avoid litigation, and that the bank might require an amended Eagles partnership agreement to provide Tose with income to meet his personal obligations. 12 App. 3232-33. Tose testified as follows:

> Mr. Kline said to me, after we sat down I think he said, "Everything looks pretty good. You know, it looks all right. But there is something — I shouldn't tell you, but I am going to tell you."
>
> I didn't know what to expect. He said, "I want you to know that Mr. Barness had a meeting with our chairman."
>
> I said to myself, and I looked at the other people that were with me, friends and associates, and I said to myself, "Let's get the hell out of here," because he said Barness would have to approve the loan.

10 App. 2622-23. Kline and Sullivan continued to discuss the loan proposal for a brief period, but there were no negotiations after February 2. Hillas and Kline both testified that they did not discuss the proposal with employees of any other bank.

G.

Appellee Chase was first asked to participate in a loan to Tose and the Eagles by officials of the Lincoln Bank of Bala Cynwyd, Pennsylvania, in November, 1977. Officials

of the two banks met with Tose and other Eagles representatives on December 8 to discuss the loan proposals.[9] Chase asked its counsel the same day to review the proposals. On December 9 Chase telephoned FPB with a credit inquiry and was told, "Our bank no longer deals with Mr. Tose. Published information will offer the reasons for our discontinuing our relationship. I can offer no details regarding his affairs." 2 App. 482. Negotiations continued between Chase and the Eagles, but the bank's counsel identified numerous obstacles to the loan.[10] Tose telephoned attorney Rome's office on December 20, 1977, and stated that he did not want to continue the discussions with Lincoln and Chase "in view of the new conditions imposed by the banks." *Id.* 498. Rome, apparently unaware of Tose's call, met with Chase officials and attorneys in New York the same day and attempted to alleviate their concerns. After listening to presentations by Rome and a Lincoln officer the Chase representatives announced that Chase was not prepared to go forward with the loans, but that they would

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[9]Appellants contend that at the end of the meeting a Chase vice-president "said they had a deal, shook hands with Tose, among others, and toasted the agreement with champagne." Brief for Appellants at 14, citing 3 App. 666-67. The evidence cited does not support this contention, and we have not discovered any other evidence in the record to provide support.

[10]The principle obstacles identified by Chase's attorneys related to Barness' right of first refusal to acquire Tose's interest in the Eagles, which would inhibit the marketability of Tose's interest if the bank had to foreclose, and ambiguities in the partnership agreement regarding transfer of the general partnership interest and appointment of a successor general partner. Counsel also referred to lawsuits filed against Tose by Barness and Firestone, the necessity for Interstate Commerce Commission approval of a promissory note to be given by Tose, Inc. (a trucking company), the requirement that the City of Philadelphia consent to assignment of the Eagles' stadium lease as security for the loan, the fact that the NFL's television contracts which were to be assigned as security were not yet in existence, and Tose's wife's dower interest in real property which was to be mortgaged as part of the loan package. *See* 2 App. 493-96, 3 App. 505, 507, 509-13, 516-19, 522-26, 531.

reconsider if problems could be worked out.[11] A Chase vice president wrote to Tose on December 27 declining the loan because of "unresolved legal matters and the expectation that a significant additional commitment of our time will be required with no assurance of a favorable outcome." *Id.* 499.

H.

In September, 1977, a loan officer at appellee Girard was contacted by James Duffy, an accountant employed by the Eagles, to ask whether Girard was interested in financing the Eagles. The loan officer discussed the inquiry with Girard vice president Walton St. Clair, who instructed him to tell Duffy that Girard was not interested. St. Clair testified at deposition that he based his decision on "[t]he general reputation of Leonard Tose." 3 App. 694. He explained that Tose was reputed to be "a very difficult man to deal with" and that a bank that dealt with Tose was likely "to be in the newspapers all the time with the various problems that he might or might not get involved in, and we didn't need that kind of aggravation." *Id.* 701.

In October, 1977, the president of a St. Louis bank called Girard president William Eagleson to ask whether Girard would participate in a loan to the Eagles. Eagleson referred the inquiry to St. Clair and instructed him to discuss the matter with a loan officer at the St. Louis bank. St. Clair told the loan officer that Girard had previously declined to

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[11]This announcement followed a private conference of the Chase representatives. One Chase officer "wanted to go ahead and try to make it work" but another wanted the application to "die" because it was "causing too much trouble." 3 App. 520. The second officer concluded the private discussions by saying, "As it stands right now, we are not prepared to make this loan. However, if you feel so strongly about it, if you can button it all up and make me happy, that [counsel] is happy, then we can talk about it again." *Id.*

discuss a loan to the Eagles because of Tose's reputation, and that it would consider the St. Louis inquiry because it came from a correspondent bank, but that "we really weren't very interested in the transaction." *Id.* 693. He agreed to await a report from the St. Louis officer concerning discussions with Tose or his representative. He subsequently reconsidered, however, and after discussions with Eagleson he notified the St. Louis bank that Girard was not interested.

Duffy again contacted Girard in late January to ask whether Girard would participate in a loan with a New York bank. St. Clair met with Duffy and others on February 2, 1978.[12] After hearing Duffy's presentation St. Clair agreed to meet with officials of the New York bank the following Monday, February 6. He also asked to meet with Tose and stated that if "he was able to convince us that he was a reasonable individual we would probably make the loan." St. Clair deposition at 38. Again, however, St. Clair reconsidered his position, this time after discussing the Duffy proposal with other Girard officers,[13] and at the scheduled Monday meeting he told the New York bankers that Girard would not participate.

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[12]St. Clair testified that he could not recall why he agreed to discuss the application with Duffy after twice refusing to consider Eagles' applications. 3 App. 706, 709-10.

[13]St. Clair met informally with three Girard officers on Friday, February 3, shortly before he departed for New York, and at least two advised him "not to make the loan because it wasn't worthwhile all the aggravation that would occur." 14 App. 3737. One of the three testified that he "had no enthusiasm for the proposal" because "[o]ver a long period of years, Mr. Tose had developed, I think, a high degree of notoriety. He appeared to me to be a contentious person and I was just not interested in considering a loan." *Id.* 3601. He was also unimpressed by financial statements and projections submitted by Duffy.

The foregoing representing what we perceive to have been appellants' best case scenario, we now turn to familiar legal precepts which govern the law of trade restraints.

IV.

Section 1 of the Sherman Act outlaws "[e]very contract, combination . . ., or conspiracy, in restraint of trade. . . ." Section 4 of the Clayton Act, 15 U.S.C. §15, provides a treble damage remedy, plus "the cost of suit, including a reasonable attorney's fee," to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The question of injury is not before us.[14] We consider only whether the district court erred in determining that appellants failed to establish a prima facie case of a §1 violation by proving the elements of conspiracy and restraint of trade.

It is well established, of course, that the Sherman Act may not be read literally. "[R]estraint is the very essence of every contract; read literally, §1 would outlaw the entire body of private contract law." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978) (footnote omitted); *see Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). To decide whether the defendants' conduct violates the restraint of trade element of §1 we must determine whether to apply a *per se* rule or a rule of reason, and if we choose the latter our inquiry must focus on the conduct's "impact on competitive conditions." *Professional Engineers*, 435 U.S. at 688, 690, *see generally id.* at 687-92.

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[14]The district court scheduled a trifurcated trial, liability, damages and counterclaims, butr omitted the trial on damages after granting judgment to defendants on all of appellants' claims.

A.

Appellants urge that "an agreement between Barness, Forstater, Bunting and the First Pennsylvania Bank to force a distress sale in favor of Barness is illegal *per se*." Brief for Appellants at 26 (citing *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979)). *Cernuto*, however, does not support appellants' theory. There we overturned a summary judgment for defendants and remanded for trial on grounds the evidence might make out a *per se* violation, but we did so purely on the theory that the evidence might demonstrate a conspiracy to fix prices by eliminating a price competitor from the market. We perceive no allegation or evidence of price fixing here.[15] Moreover, as *Cernuto* noted, *per se* treatment has been limited to "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 166 (quoting *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958)). As the Court has noted more recently, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States v. Topco Associates*, 405 U.S. 596, 607-08 (1972) (quoted in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979)). The law of antitrust is a collection of judicially formulated legal precepts giving fiber and sinew to the abstract language of the statutes. The courts that have formulated these precepts have accompanied them by a reasoned elaboration. In carv-

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[15]Count four alleges a conspiracy to fix prices — interest rates charged on bank loans — in violation of §1. We deal with count four separately, in Part VI. of this opinion.

ing out *per se* categories, the courts have not abandoned the necessity for a rule of reason. Rather, the *per se* doctrine is the law's recognition that probabilities abide in the laws of business and logic. Where judicial experience teaches that a particular business practice "blatantly restricts competition," to use Professor Sullivan's phraseology, it is not necessary to set forth an expansive explanation. We are "spared the need for elaboration," because the laws of economics persuasively predict how the balance will come out. *See* L. Sullivan, Handbook of the Law of Antitrust §72 (1977). As to this case, however, we are not aware of any body of judicial experience teaching that "an agreement . . . to force a distress sale" of a partner's share of a business has a "pernicious effect on competition and lack[s] . . . any redeeming virtue," so we find no warrant for application of a *per se* rule.

B.

Under the rule of reason we consider

> whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the [conduct] or (2) on surrounding circumstances giving rise to the inference or presumption that [it was] intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

Professional Engineers, 435 U.S. at 690 (footnotes omitted) (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911)). *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (to recover treble damages on account of Clayton Act §7 violations, plaintiffs "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from

that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possibly by the violation'').

Appellants contend that appellees FPB and Forstater conspired with Barness to force Tose to sell his partnership interest in the Eagles. We think appellants' claim against these appellees must fail because they have neither alleged nor proved an unreasonable restraint of trade. Appellants offered no evidence that the purported conspiracy would or was intended to damage competition in any market, choosing to rise or fall on their *per se* theory. We are unable to discern how appellees' conduct would affect competition, either favorably or harmfully, and we find no evidence of any anticompetitive motive. Clearly the conduct of FPB, Barness, and Forstater make out a strong case that they, individually and collectively, for separate reasons, resisted Tose's efforts to obtain financing on the terms he proposed. And just as clearly the record indicates that officers of FPB are not adverse to playing hard ball when the corporate mind is made up to rid themselves of one of their customer debtors. But proof of ruthlessness in the FPB executive suite is not proof of a violation of the federal antitrust statutes. The antitrust laws are simply indifferent to conduct of this nature. No appellee competes with any appellant in any market or line of commerce; and there is no evidence that the professional football team's ability to compete in the spectator sport or entertainment industry in the Philadelphia area, or in any other market, would be either assisted or thwarted by a change of ownership. Tose alleges that he has suffered actual damage as a result of appellees' attempt to force him to sell the Eagles, and for present purposes we must assume the truth of that allegation. *See* footnote 15, *supra*. We see nothing, however, to demonstrate that Tose

has been damaged as a competitor or as a result of any anticommpetitive practice. We cannot hold on this record that those who engage in a struggle for partnership control of one entity are competitors for purposes of the Sherman Act. *Cf. United States v. Morgan*, 118 F.Supp. 621, 689 (S.D.N.Y. 1953) ("[w]hen we speak of competitors nothing but confusion will follow unless we first determine what is the 'it' for which the competitors are supposed to be competing"). Nor are we inclined to open the door to antitrust claims against, for example, a bank that agrees to finance a minority stockholder's tender offer. Sales of businesses are a fact of life in our economy, carefully regulated by Congress in another part of Title 15, and we suspect that many are encouraged by the efforts of uneasy and perhaps overbearing creditors to protect their investments and of minority owners to oust established management. Without proof of anticompetitive intent or impact, losses sustained in an intracorporate or intrapartnership power struggle "are of no concern to the antitrust laws."[16] *Brunswick*, 429 U.S.

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[16]*Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), are not to the contrary. *Reiter* held that a consumer who pays a higher price for personal goods as a result of an antitrust violation (a consiracy to fix prices) may sue under §4 of the Clayton Act, which provides a treble damages remedy for "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." (The court of appeals had held that §4 only authorizes relief for injuries of a commercial or business nature.) *Klor's* disapproved of the so-called "public wrong doctrine," holding that a single retailer may obtain relief for an antitrust violation (a group boycott instigated by a competing seller) even if the public is not denied the opportunity to buy in a competitive market. The question of violation was not an issue in *Reiter* or *Klor's*. Each plaintiff alleged conduct that had previously been designated illegal *per se* due to its anticompetitive effects. The plaintiff in *Klor's* was denied the ability to compete for retail sales. The plaintiff in *Reiter* was charged a higher price for goods because her seller had agreed with his competitors not to engage in price competition. Tose, by contrast, asserts only that he was damaged by a conspiracy between his banker and his limited partner to force him to sell his share of the partnership. Without proof that the alleged conspiracy was intended or likely to affect competition, and therefore "forbidden in the antitrust laws," he cannot obtain relief under §4.

at 487. *See generally In re Transocean Tender Offer Securities Litigation*, 427 F.Supp. 1208 (N.D. Ill. 1977). We find nothing in either the nature or character of the alleged conduct or its surrounding circumstances to support an inference that it was intended or likely to restrain trade or enhance prices. Accordingly, we hold that appellants did not establish a prima facie case under §1 of a conspiracy consisting of FPB, Barness, and Forstater.[17]

We see no similar obstacles to appellants' claim that the appellee banks and others conspired to deny them access to the credit market. The clear effect of such a conspiracy would be to stifle competition among the participants for a substantial credit transaction, with the further result of hindering the free flow of goods, services, and investment capital as dictated by market forces of supply and demand. We conclude that appellants have successfully alleged an unreasonable restraint of trade in violation of §1. Therefore, we must review the record to determine whether appellants were entitled to a jury determination of the question of a banking boycott conspiracy involving variously, Barness, and the First Pennsylvania, Provident, Girard, Chase, and Philadelphia National banks. The banking boycott allegations relate to the period from July 29, 1977, to March 1, 1978. Appellants attempted to prove tht Barness and FPB persuaded Provident, Girard, Chase, and PNB to join a

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[17]Our cases make clear that proof of anticompetitive impact or intent is a necessary element of a prima facie case under the rule of reason. *See, e.g., Franklin Music Co. v. American Broadcasting Co., Inc.*, 616 F.2d 528, 541-42 (1979) (Gibbons, J., announcing decision of the court); *id.* at 553-56 (Sloviter, J., concurring in part); *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 448 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978), *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). *Cf. Brunswick*, 429 U.S. at 489 (plaintiff must prove "antitrust injury").

conspiracy to deny Tose and the Eagles access to the credit market and thereby to force Tose to sell his interest to Barness.

A.

We begin by determining that FPB was not shown to be a participant in any conspiracy to interfere with the credit market. There is no evidence that any FPB personnel discussed Tose or the Eagles with Barness after July 28, and the only evidence of any contact between FPB and any other appellee bank shows that FPB responded to a telephone credit inquiry from Chase by stating that FPB "no longer deals with Mr. Tose," referring the caller to "[p]ublished information," and declining to provide any "details regarding his affairs." 2 App. 482. Appellants properly emphasize Bunting's July 28 threat to "make sure you don't get financed by any bank in the country." 10 App. 2595. We recognize that this language is highly inculpatory, a direct threat to deny appellants the financing they desperately needed to stay afloat. This evidence, together with evidence of Hayes', Pemberton's, and Bunting's responses to credit inquiries, would support a finding that FPB desired and attempted to discourage other banks from granting loans to Tose or the Eagles. Section 1 does not prohibit unilateral activity, however. As one cannot clap with one hand, and as it takes two to tango, so in a §1 case there must be proof of more than solitary conduct; there must be proof of concerted action. *See, e.g., United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Sweeney*, 637 F.2d at 110-11. We have searched the record in vain for evidence from which a jury could reasonably infer that FPB and others had "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement."

American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).

Other courts of appeals have previously determined that §1 does not reach a putative "conspiracy" between a corporation and its employees.[18] This simply is not regarded as the requisite "concerted action." The leading decision appears to be *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert denied*, 345 U.S. 925 (1953). Judge Borah wrote for the court in *Nelson Radio*,

> Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served, or the quality of goods to be produced do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act. . . . The defendant is a corporate person and as such it can act only through its officers and representatives. It has the right as a single manufacturer to select its customers and to refuse to sell its goods to anyone for any or no reason whatsoever. It does not violate the Act when it exercises its rights through its officers and agents, which is the only medium through which it can possibly act.

200 F.2d at 914. The *Nelson Radio* rule arguably has not heretofore been established in this circuit. *Compare Johnston v. Baker*, 445 F.2d 424, 427 (3d Cir. 1971), *with*

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[18] *See, e.g., Card v. National Life Insurance Co.*, 603 F.2d 828, 834 (10th Cir. 1979); *H & B Equipment Co., Inc. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.*, 531 F.2d 910, 917 (8th Cir. 1976); *Greenville Publishing Co., Inc. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 & n.9 (9th Cir. 1969).

Goldlawr, Inc. v. Shubert, 276 F.2d 614, 617 (3d Cir. 1960). We now adopt the reasoning of *Nelson Radio* and hold that a corporation and its employees cannot be treated as separate entities to establish a conspiracy under §1. This precludes any suggestion that FPB conspired with its officers, appellees Bunting and Pemberton, or that Bunting and Pemberton conspired between themselves or with other FPB employees.

B.

We turn now to the other appellee banks. We note preliminarily that witnesses representing each of the banks testified that they made their decisions independently, without discussing appellants' applications with officials of any other banking institution. Appellants are not bound by that testimony, of course, and a jury would be free to disregard all such evidence; but "mere disbelief could not rise to the level of positive proof of agreement to sustain [appellants'] burden of proving conspiracy." *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975); see *Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576-78 (1951).

1.

With regard to both phases of the alleged conspiracy, appellants make much of the point that appellees and others had opportunities to conspire. *See, e.g.*, Brief for Appellants at 27, 29. We agree that there was ample proof of opportunity to conspire. For example, the record would support a finding that each alleged conspirator had access to a telephone at all relevant times, and a jury could find that members of the Philadelphia banking community belong to an "old boy network" and have numerous social and business relationships. But we must recognize the distinction between opportunity to perform an act and its actual performance.

Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place. Inferred factual conclusions based on circumstantial evidence are permitted only, and to the extent that, human experience indicates a probability that certain consequences can and do follow from basic facts. Human experience does not support the inference of actual conspiracy from proof of the basic fact of opportunity to conspire.

2.

Appellants offered no direct evidence of conspiracy, but they argue that concerted action may be inferred from evidence of parallel business behavior. In such a case a plaintiff must establish "two elements generally considered critical in establishing conspiracy from evidence of parallel business behavior: (1) a showing of acts by defendants in contradiction of their own economic interests, . . . and (2) satisfactory demonstration of a motivation to enter an agreement . . . ." *Venzie*, 521 F.2d at 1314 (citations omitted). Appellants attempted but failed to prove each of these elements. To meet the first element, appellants argue that "there is evidence in the present case that the loan was a profitable business deal for the banks and that there were substantial fringe benefits in promoting the loan." Brief for Appellants at 30 (footnote omitted). As to the second, they contend that the banks had "strong motives to support Bunting, *inter alia*, against the 'insolent' behavior of Tose in challenging Bunting publicly . . . in the press conference of August 10, 1977." *Id.* at 31.

We assume, without deciding, that appellants introduced sufficient evidence to support a finding that the loan applications were "a sound business proposition with substantial profit potential." *Id.* at 11. Such a finding would not alone support the further inference that the banks acted in con-

tradiction of their own economic interests. Each appellee bank presented substantial business reasons for its actions, and appellants did not challenge or rebut those explanations. We must consider the record as a whole and we cannot permit a jury to rest its decision on speculation or unreasonable inferences. A business's refusal to enter a transaction, even a transaction with potential for a substantial profit, cannot support an inference that it acted in contradiction of its own economic interests in the face of substantial unrebutted and unimpeached evidence that its refusal was consistent with its own best interests. *See, e.g., Venzie,* 521 F.2d at 1314-15.

Even if we were to resolve the first element of the *Venzie* test in appellants' favor, however, we would hold that they have failed to satisfy the second element, proof of motivation to enter an agreement. Appellants rely on the banks' "many relationships among themselves," which include "participating loans . . ., close ties in the Philadelphia Clearing House . . ., corresponding relationships[,] and personal friendships of long standing." Brief for Appellants at 31. This presentation must be weighed against the business justifications offered by appellees, and against the inherent improbability of an agreement to refuse profitable business for non-economic reasons. Appellants' evidence of motivation is clearly insufficient. The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncracies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts. As the Supreme Court has stated, "the essential requirement

is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway v. United States*, 319 U.S. 372, 395 (1943). We are persuaded that the district court properly refused to permit the jury to render a verdict in this case based on "mere speculation."

3.

We review the evidence relating to appellee Provident separately because it was clearly established that Provident officers discussed Tose and the Eagles with Barness while it was considering the loan applications.[19] We assume, again without deciding, that the jury could find that Barness hoped to block any loan to Tose so that Tose would be forced to sell. There is no evidence, however, that he enlisted or attempted to enlist Provident as an ally in that purpose. Moreover, appellants have not explained why Provident would forego a profitable opportunity in order to help Barness take over the Eagles. Absent either direct evidence of a specific conspiracy or circumstantial evidence that would vault parallel business behavior into "concerted action" under the *Venzie* test, the most damaging reasonable inference is that Barness persuaded Provident to condition its loan on his approval by demonstrating his ability to prevent execution on the collateral. This falls far short of "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Sweeney*, 637 F.2d at 111.

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[19]Barness also contacted Chase about the loans, but not until after Chase had rejected the applications and communicated its decision to Tose. Thus, the Barness contact adds nothing to the case against Chase.

4.

We conclude, therefore, that a jury could not reasonably infer from the evidence that any appellee conspired with any other person or entity to deny Tose access to the credit market, and that the district court did not err in granting summary judgments and directed verdicts on count one.

VI.

Count four of the amended complaint charges the appellee banks with conspiring to fix interest rates in the greater Philadelphia four-county area. Appellants' theory is that express written agreements among banks to follow the prime interest rate charged by the lead bank on joint loans have the effect of "tampering" with the prime interest rate charged on single bank loans, and therefore that they are *per se* violations of §1. They do not assert that the evidence shows any express agreements to fix the interest rates on single bank loans. *See* Brief for Appellants at 39. We think the merits of this claim are doubtful,[20] but we do not consider

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[20]Not every pricing agreement between businesses is subject to the *per se* rule of illegality established in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). The Supreme Court has recognized that cooperation among businesses in some situations is pro-competitive, and therefore in accord with the purposes of federal antitrust law, because two or more businesses acting together can achieve desirable ends that an individual business cannot. As the Court noted in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979), "[j]oint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." Joint lending arrangements provide support for a vigorous economy by making possible large extensions of credit beyond the capacity of any single bank. *Cf. United States v. Morgan*, 118 F.Supp. 621 (S.D.N.Y. 1953) (system of syndicated underwriting of new securities to be sold at a fixed price schedule held a reasonable business combination with the purpose and effect of efficiently promoting trade); *see generally United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). We recognize that appellants do not attack participating loans, but only the practice of following the lead bank's prime rate, as illegal *per se*. It may be that the record would preclude summary judgment if appellants had standing to raise this claim, because of a genuine factual question whether "the agreement on price is necessary to market the product at all." *Broadcast Music*, 441 U.S. at 23. Because of the view we take, however, we need not reach that question.

the merits because appellants lack standing to assert this claim.

To satisfy "the minimum [standing] requirement of Art. III" a plaintiff must "establish that, in fact, the asserted injury was the consequence of the defendants' actions. . . ." *Warth v. Seldin*, 422 U.S. 490, 505 (1975). *See generally O'Shea v. Littleton*, 414 U.S. 488 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). *See also Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251 (3d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3620 (U.S. Feb. 11, 1981) (No. 80-1353); *Sound Ship Building Corp. v. Bethlehem Steel Co.*, 533 F.2d 96 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976). Appellants have failed to establish the necessary personal stake in the controversy, the requisite injury in fact. Tose and the Eagles had only a single-bank loan, so they were not directly affected by the practice of lock-step pricing of joint loans. Their argument rests on the assertion that "it ought to be obvious that a multitude of agreements on joint loans by which banks reciprocally agree to charge each others' prime interest rate has a natural tendency to stabilize the prime interest rate generally and, indeed, to make it identical among all banks." Brief for Appellants at 41. They attempt to bolster this assertion by pointing to "the striking identity of defendants' prime interest rate changes over the years." *Id.* at 40. This is insufficient. Bald factual assertions will not substitute for evidence of causation, and "the striking identity of defendants' prime interest rate changes" can be readily explained

by market pressures.[21] Appellants produced no evidence that lock-step pricing of joint loans had any effect on the rate charged on their own loans, and by their cross-motion for summary judgment they implicitly represented that they had no additional evidence to offer. We hold, therefore, that the district court did not err in granting summary judgment on count four of the amended complaint.

VII.

We now turn to count two, the Bank Holding Company Act claim. Appellants argue that the FPB appellees violated 12 U.S.C. §1972(1)(C), which provides: "A bank shall not in any manner extend credit . . . on the condition or requirement . . . (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan . . . ." Section 1975 authorizes private actions for treble damages for violations of §1972. Appellants find violations in

> (1) the conspiracy to oust Tose in favor of Barness as a condition for financing the Eagles; (2) the insistence that a known disloyal subordinate [Forstater] be installed as chief executive officer over Mr. Tose as a condition either for continuing the $5.3 Million term

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[21] *See, e.g., Weit v. Continental Illinois National Bank*, Nos. 79-1077, 79-2113 (7th Cir. Feb. 11, 1981). In an opinion affirming a summary judgment for defendants on charges of a bankers' conspiracy to fix the interest rate on bank credit cards at 18% per annum, the court "noted that parallel pricing or conduct lacks probative significance when the product in question is standardized or fungible," slip op. at 11 (citations omitted), and continued: "In the instant case, the product in question is consuumer credit, or more fundamentally, the cost of borrowing money for a given period. The underlying product—money—is not only fungible, it is by definition an interchangeable medium of exchange." *Id.* at 11-12. *See generally Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 665 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *United States v. FMC Corp.*, 306 F.Supp. 1106, 1139 (E.D.Pa. 1969) (Higginbotham, J.).

> loan to its stated maturity date in 1979 or for re-lending the Eagles their own preseason [ticket] money . . .; and (3) the plan to force Tose to sell to Barness . . . .

Brief for Appellants at 32.

Items (1) and (3) are essentially identical and may be considered together.[22] There is no evidence that Tose's ouster in favor of Barness was made a "condition or requirement" of a loan to the Eagles or to Tose. Appellants allege only that Tose's ouster in favor of Barness was the hidden agenda behind the conspiracy charged in count one. This does not satisfy the "condition or requirement" element of §1972(1)(C). Summary judgment was properly entered on this theory.

Summary judgment also was proper on item (2) of this claim, but for a different reason. Appellees concede that FPB demanded that Tose relinquish financial control of the Eagles to Forstater as a condition to continuing the loan. In the circumstances of this case, however, we hold as a matter of law that this was not a demand for a "service . . . other than those related to and usually provided in connection with a loan." Imposition of financial controls over the Eagles was directly related to maintaining the security of FPB's substantial investment, and the bank's demand cannot be considered unusual in the face of substantial evidence that it had good reasons to be concerned about the loan. As the district court held in *Sterling Coal Co., Inc. v. United American Bank in Knoxville*, 470 F.Supp. 964, 965 (E.D. Tenn. 1979), "[t]he Act does not prohibit attempts by banks to protect their investments." Our holding agrees with the first circuit's recent decision in *B.C. Recreational Industries v. First National Bank of Boston*, No.

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[22]Conspiracy is not an element of a §1972(1)(C) violation.

80-1383, 1980-81 Trade Cases (CCH) ¶ 63,778 (1st Cir. Jan. 30, 1981). The court held in that case that a creditor's demand that its debtor employ a designated full-time business advisor, because it felt that the debtor was "in a precarious financial condition," 1980-81 Trade Cases at page 78,139, was "within the range of appropraite traditional banking practices permissible under the Act." *Id.* at page 78,141. Our approach also finds support in the legislative history of the Act, which states that §1972(1)'s purpose "is to prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire." S. Rep. No. 1084, 91st Cong., 2d Sess. ...., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5519, 5535. This purpose would not be served in any way by holding FPB's conduct illegal. We find nothing anticompetitive in a requirement that a debtor put its financial house in order by replacing its chief financial officer with a responsible official designated by the bank.[23]

VIII.

Invoking the pendent jurisdiction of the district court, Tose asserts claims for intentional interference with "present contractual relations" and "prospective advantageous business relations." These claims are recognized as compensable torts under the law of Pennsylvania. *See Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 207-10, 412 A.2d

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[23]We affirm the judgment in favor of Bunting and Pemberton for an additional reason. Section 1972(1) provides that "[a] bank shall not" engage in certain conduct, but it does not forbid individual conduct. The term "bank" is defined in §1971, incorporating the definition found in §1841(c) of the same title, as an "institution . . . ." Further, §1972(2)(F) expressly forbids certain indivudual conduct, which leads us to infer that Congress deliberately limited §1972(1) to banks. Therefore, Bunting and Pemberton could not in any event be held liable for a violation of §1972(1)(C).

466, 470-72 (1979); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 482 Pa. 416, 429-33, 393 A.2d 1175, 1181-84 (1978), *appeal dismissed*, 442 U.S. 907 (1979); *see also* Restatement (Second) of Torts §§766, 766B (1977). Tose, however, claims only damages for the emotional distress which appellees reasonably could have expected to result from their actions. This injury alone is not compensable in an action for interference with contractual or business relations. Restatement (Second) of Torts §774A(1)(a)-(c), respectively, permit recovery of damages for the pecuniary loss of the benefits of the contract or the prospective relation, consequential losses legally caused by the interference, and emotional distress or actual harm to reputation reasonably expected to result from the interference[24] Section 47 of the Restatement (Second), however, provides, with exceptions not relevant to this case, that tortious conduct "does not make the actor liable for an emotional distress which is the only legal consequence of his conduct." Reading the two sections together, Tose can recover for emotional distress under §774A(1)(c) only if he also proves damages under subsection (a) or (b). He does not claim damages except under sub-section (c), however, so this claim was properly dismissed.

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[24]The Supreme Court of Pennsylvania has frequently adopted sections of the Restatement (Second) of Torts as Pennsylvania common law when its "common-law precedents varied from the Restatement or when the Pennsylvania common law provided no answer." *Gilbert v. Korvette's, Inc.*, 457 Pa. 602, 611-12n.25, 327 A.2d 94, 100 n.25 (1974) (citations omitted). The Court looked to Restatement (Second) §§766, 766B, and 767 in establishing rules of liability for interference with existing or prospective contractual relations in *Thompson Coal*, 488 Pa. at 207-08, 412 A.2d at 470, and in *Adler, Barish*, 482 Pa. at 430-34, 393 A.2d at 1183-84. We believe that if it were presented with the question the Court would adopt the ancillary rules stated in §§774A and 47 as Pennsylvania common law, so we look to those sections in fashioning rules for decision of this case.

Even if we did not affirm on this basis, however, we would hold that Tose failed to establish a prima facie case of liability. His ownership interest in the Eagles is not a present contractual relationship protected by Pennsylvania common law, and if it were he has not established any interference with that relationship. His claim for interference with prospective business relationships with the appellee banks also fails for two reasons: first, he did not introduce "adequate proof" of a "reasonable likelihood or probability" that he would receive loans from any bank absent the alleged interference *See Thompson Coal,* 488 Pa. at 209, 412 A.2d at 471. Second, he did not introduce sufficient evidence to support a finding that any appellee improperly interfered with his prospective business relations. *See* Part IV.B., *supra;* Restatement (Second) of Torts §§767, 772.

IX.

A.

Forstater recovered $69,000 on a counterclaim based on an oral contract of employment between himself and appellants. The district court asked the jury to determine whether Forstater was "a disloyal employee who agreed with . . . First Pennsylvania Bank to attempt to force Mr. Tose to sell his share of the Eagles," Joint App. at 370, presumably on the theory that Forstater's disloyalty would constitute a breach of the contract and justify his discharge. The jury answered this interrogatory in Forstater's favor. *Id.*

Appellants raise two objections on appeal. First, they argue that the district court abused its discretion in directing the jury to disregard certain evidence presented at the trial on appellants' claims. Brief for Appellants at 34. This argument misrepresents the record. The district court did not direct the jury to disregard any evidence, but began its

charge by specifically instructing the jury to consider evidence "offered in the original case brought by Mr. Tose." Joint App. at 311; *see also id.* at 315-16. Appellants cite 10 App. 2732-33, but those pages contain a transcript of the argument on which exhibits should go to the jury room, not jury instructions. Appellants do not argue that the court abused its discretion in selecting exhibits for the jury room, and we see no reason to hold that it did so. We concluded, therefore, that appellants' argument that "the jury was improperly precluded from considering competent evidence," Brief for Appellants at 35, is without merit.

Second, appellants contend that the trial court erred in instructing the jury that if Forstater told the truth he could not be "disloyal," without discussing the scope of his authority or whether he would have injured his employer if he exceeded his authority. Brief for appellants at 35-36. Again, however, appellants mischaracterize the record. The court actually told the jury that "*if* Mr. Forstater was obliged, as a part of his duties for the Eagles and Mr. Tose," to answer FPB's questions on behalf of Tose and the Eagles, "the answering of the questions truthfully could not lead to an inference of disloyalty." Joint App. at 351 (emphasis added). The court continued its charge by telling the jury to base its "disloyalty" decision on its "evaluation of all the evidence," *Id.*, and then discussed evidence favorable to appellants. *Id.* at 352-53. We see no error in the instruction. In addition, the record fails to demonstrate that appellants objected to these instructions before the jury retired to consider its verdict, as required by Fed. R. Civ. P. 51, so they are precluded from raising the issue on appeal.

B.

Forstater's cross appeal assigns error to the district court's refusal to grant judgment n.o.v. or a new trial on a counterclaim based on a written promise by Tose to pay him

$159,000. His appeal depends on a letter to Forstater signed by Tose and on §1 of the Pennsylvania Uniform Written Obligations Act, Pa. Stat. Ann. tit. 33, §6 (Purdon 1967). That statute provides: "A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." The letter on which Forstater relies is worded as a proposal, but the parties have construed it as a promise to pay the money. The letter concludes as follows:

> Intending to be legally bound, I am
> Sincerely,
> /s/ Leonard H. Tose
> Leonard H. Tose

Joint App. at 39.

Forstater argues on appeal that the district court erred in permitting the jury to consider whether Tose signed the letter "knowingly," and he argues alternatively that there was insufficient evidence to sustain the jury's finding that Tose did not sign knowingly.

Forstater would have us hold that under Pennsylvania law a promise containing language of intention to be legally bound is enforceable as a matter of law, without regard to any defenses available to the promisor, and therefore that the district court erred in denying his motion for judgment n.o.v. We cannot agree. The statute provides only that a promise in proper form "shall not be invalid or unenforceable for lack of consideration." It does not purport to do away with any other defense to enforceability, and we construe it according to its terms. Our position is supported by *Rose v. Rose*, 385 Pa. 427, 123 A.2d 693 (1956), in which

the Pennsylvania Supreme Court held void a promise executed in compliance with the Written Obligations Act that was induced by "bad faith or fraud." *Id.* at 433, 123 A.2d at 697.

We agree that the district court's instruction, that a lack of knowledge would relieve Tose of liability, was erroneous. Ignorance of the contents of a document or failure to read before signing is no defense to a contractual obligation under Pennsylvania law. *See, e.g., Estate of Brant*, 463 Pa. 230, 235-36, 344 A.2d 806, 809 (1975); *T. W., Phillips Gas & Oil Co. v. Kline*, 368 Pa. 516, 518, 84 A.2d 301, 302 (1951). *See also Brokers Title Co., Inc. v. St. Paul Fire & Marine Insurance Co.*, 610 F.2d 1174, 1180-81 (3d Cir. 1979). We are precluded from reversing on this ground, however, because Forstater's counsel did not object to the instruction before the jury retired to consider its verdict. Fed. R. Civ. P. 51.[25]

Forstater's alternative argument is entirely without merit. Tose testified that it was not his habit to read documents that Forstater presented for his signature "word for word," and that he did not read the letter at issue before he signed it. Joint App. at 303. Forstater attacks this testimony as "perjury" and "lies." Brief for Appellant Forstater at 33. He offers no other argument. This is inadequate. Issues of credibility are properly left to the jury, and the jury answered this issue in favor of Tose.

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[25]We note that Tose requested the court to instruct the jury regarding the existence and effect of a confidential relationship between the parties. *See generally Young v. Kaye*, 443 Pa. 335, 342-43, 279 A.2d 759, 763 (1971). Forstater did not join in this request, however, and so he may not assign error to its refusal.

X.

The judgments appealed from will be affirmed in all respects. Costs taxed against appellants and cross-appellants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Rehearing denied on May 22, 1981.

APPENDIX B.

Leonard H. TOSE et al., v. First Pennsylvania Bank et al., Civ. A. No. 78-1499.

United States District Court, E. D. Pennsylvania, May 28, 1980.

MEMORANDUM

CLIFFORD SCOTT GREEN, District Judge.

Pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, Leonard H. Tose, The Philadelphia Eagles Football Club and Tose, Inc., have brought this treble damages action for alleged violations of the federal antitrust laws. Plaintiffs claim that defendants, First Pennsylvania Bank, its former Chairman, John R. Bunting, its Vice Chairman, John C. Pemberton, Provident National Bank, The Chase Manhattan Bank, Girard Bank, The Philadelphia National Bank and Sidney Forstater, entered into conspiracies to unreasonably restrain trade in violation of Sections 1 and 2 of the Sherman Act. The alleged purposes of the conspiracies were: 1) to form a "banking boycott" which would deny plaintiffs access to the credit market in the Philadelphia area and 2) to fix the prime interest rate so that all defendant banks would charge a "uniform non-competitive prime rate". In addition, plaintiffs allege that the defendants' activities constitute malicious interference and conspiracy to interfere with advantageous contractual relations and business prospects under Pennsylvania law. As to the First Pennsylvania Bank defendants alone, there is an allegation that a provision of the Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1972(1)(C), has been violated.

Now before the Court are the parties' cross-motions for summary judgment and partial summary judgment. For the reasons set forth in this memorandum, I have granted the

motions of defendants Girard and Chase Manhattan and entered summary judgment in their favor on all claims.[1]

I. FACTUAL HISTORY

The factual history of this litigation is rather involved; however, I will summarize the events as briefly as possible. The present dispute between Leonard Tose (Tose) and the defendants dates back to 1969 when defendant First Pennsylvania Bank (FPB) loaned Mr. Tose ten million five hundred thousand dollars ($10,500,000) so that he could buy the Philadelphia Eagles Football Club (Eagles).[2] In addition to the money advanced by FPB, a group of investors loaned some four million dollars ($4,000,000) to Tose to help finance his purchase of the Eagles. Tose acquired the assets of the football club in his name and then transferred them to a limited partnership. Under the terms of this partnership agreement, Tose was to be the sole general partner and the various individual investors who had loaned Tose $4,000,000 were to be limited partners. (RA # 2, Exh. 3)

The Eagles Partnership formed by Tose soon encountered problems. First, several of the investors rejected the limited partnership proposal and brought suit in the Court of Common Pleas of Philadelphia County against Tose claiming that they had lent the money with the understanding that they would become general partners. Although the Court rejected their claims in 1972, Tose borrowed an additional $2,678,000 from FPB in order to repay the disgruntled investors.

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[1]On May 16, 1980, I entered an order stating my decision on the various cross-motions for summary judgment and partial summary judgment.

[2]Requests for Admission by Plaintiffs # 2 of FPB defendants (RA #2), Exh. 2.

In 1973, investor/limited partner Solomon Katz requested Tose to return his investment. In order to repay Katz, Tose borrowed $1,240,000 from Herbert Barness, another limited partner in the Eagles, and as forgiveness of the loan, Barness received Katz's share in the Eagles Partnership. On or about July 16, 1973, Tose and Barness executed an agreement whereby each agreed to purchase the interest of the other for the amount of their original investment should one die, retire, go bankrupt or be adjudicated insane or incompetent. (RA # 2, Exh. 9)

By the end of 1974, the Eagles limited partnership consisted of Tose, as sole general partner, Barness, Anne Firestone, as the Executrix of the Estate of Roger Firestone, John Firestone and Walter Leventhal. (RA # 2, Exh. 38). In October of 1975, Tose purchased the Firestone Estate's 9.813% limited partnership interest; his offer to buy John Firestone's 6% share was rejected because Firestone thought the offering price was inadequate. (RA # 2, Exh. 41)

Also, by the end of the 1974 season, due to such factors as high interest rates, a players' strike, a poor pre-season attendance, the Eagles had a negative cash flow.[3] As a result of these financial problems, the Eagles could not make their June 30, 1974 amortization payment of $750,000 to FPB. Accordingly, on November 1, 1975, Amendment No. 1 was added to the Eagles Restated Loan Agreement with FPB. (RA # 2, Exh. 44) This provision adjusted the amortization schedule and set $60,000 as the maximum amount of money which Tose could take from the Eagles as salary and ex-

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[3]Gerald Hayes, the FPB loan officer supervising the Eagles account, noted in an internal memorandum that Tose's extravagant manner of operating the club contributed to the Eagles' financial woes. (RA # 2, Exh. 40)

penses during unprofitable years.[4] Also, in June of 1976, Tose and Barness entered into another agreement which included, *inter alia*, provisions giving each man the right of first refusal should the other decide to sell his interest in the Eagles.

During 1976, relations among the remaining members of the Eagles partnership soured. After much wrangling, in December of 1976, Tose and Firstone were finally able to agree on terms for the sale of the Firestone interest to Tose. By the end of that year, Barness, for reasons which are in dispute, wanted to sell his approximate 29% share of the partnership. Moreover, when the Comptroller of the Currency reviewed the loan portfolio of FPB at the end of December, 1976, he graded the bank's loan to the Eagles as "substandard".

FPB contends that as a reseult of this poor rating, during the early part of 1977, FPB began to reassess its loan to Tose and the Eagles.[5] In March of 1977, Gerald Hayes, the supervising loan officer, wrote two memoranda, one to Cameron S. Clark, Executive Vice President, and one to John R. Bunting, then Chairman of FPB, recommending changes in the loan agreement with Tose. (RA # 2, Exhs. 134, 141). One of Hayes' suggestions was that Tose be required to give up financial control of the Eagles. However, in a meeting attended by Hayes, Bunting, Tose and his lawyer, Edwin Rome, on March 25, 1977, FPB took a much softer line. Although Bunting got Tose to agree to the need

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[4]The Amendment also granted Tose certain additional benefits for the periods when the Eagles were making a profit.

[5]An audit of the Eagles' books for 1976 revealed that as of the end of that year the Eagles were in default of certain provisions of the FPB loan. FPB, upon request, waived these defaults. (RA # 2, Exh. 159.) The events of default did not include delinquency of payment of principal and/or interest.

for tighter control of expenditures by the Eagles, he also responded favorably to Tose's suggestion that FPB loan additional funds to Tose so that he could purchase Barness' share in the football club. (Rome deposition, 7/14/78, p. 38-41). Also, during March of 1977, Firestone, claiming that Tose had defaulted on their Agreement of Sale and Security Agreement, invoked the acceleration clause and demanded payment in full for his interest in the Eagles. (RA # 2, Exhs. 138-145)

Throughout the spring and early summer of 1977, FPB and Tose continued to negotiate regarding reorganization of the management of the Eagles as well as about the additional loan to Tose.

Although the parties dispute who and what caused the breakdown, negotiations between Tose and FPB had ceased by July 22, 1977. (RA # 2, Exh. 258). The plaintiffs and FPB defendants also give differing accounts of a meeting attended by Tose, Rome, Bunting and Pemberton which took place on July 28, 1977. Plaintiffs maintain that Bunting and Pemberton called FPB's six million dollar loan to the Eagles, giving Tose approximately sixteen hours to come up with alternative financing. Also, they claim that Bunting stated that he would make sure that no Pennsylvania bank would provide this financing. The FPB defendants deny making such threats. It is undisputed, however, that on July 29, 1977, FPB made Sidney Forstater, another defendant in this case, the Chief Financial Officer of the Eagles. (RA # 2, Exh. 265). Forstater's management of the club lasted until August 10, 1977, when Tose was able to obtain a six month "bridge loan" from a Detroit bank so he could pay off the FPB loan.

II. ANALYSIS

A. *COUNT I—THE CONSPIRACY TO ENGAGE IN A BANKING BOYCOTT*

All of the defendants have moved for summary judgment on Count I of the Amended Complaint which states that defendants, in violation of Section 1 and 2 of the Sherman Act, conspired and combined to unreasonably restrain trade by forming a banking boycott of the plaintiffs. In support of their motion on the boycott issue, defendants make two principal arguments. First, they assert that the plaintiffs have failed to adduce, as they must to defeat summary judgment, "significant probative evidence" that any conspiracy existed. Secondly, even assuming that the evidence of a conspiracy is sufficient to overcome the motion for summary judgment, defendants urge that the plaintiff have not alleged facts nor developed evidence that would establish that the conspiracy resulted in an unreasonable restraint of trade as is necessary to maintain a cause of action under Sherman § 1. In response to these arguments, plaintiffs state that they have indeed produced evidence of a conspiracy sufficient to overcome summary judgment and that they need not show that defendants' actions have resulted in an anticompetitive effect because this case involves a *per se* violation of the Sherman Act.

It is settled that summary judgment should be used sparingly in complex antitrust cases involving questions of motive and intent. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). Moreover, since direct proof of a conspiracy is rare, a plaintiff attempting to prove a conspiracy in violation of the Sherman Act must usually rely on the inferences that can be drawn from circumstantial evidence. *Milgram v. Loew's Inc.*, 192 F.2d 579, 583 (3d Cir. 1951). At the

summary judgment stage, I must determine whether or not the record provides evidence from which an inference of conspiracy could reasonably be drawn. *Lamb's Patio Theatre v. Universal Film Exchanges*, 582 F.2d 1068, 1069 (7th Cir. 1978). Summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in significant discovery, fail to product "significant probative evidence" in support of the allegations in their complaint. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 389-90, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968). *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 579 (3d Cir. 1979). With these legal standards in mind, I turn now to an analysis of plaintiffs' case against each of the defendants for a conspiracy to carry out a "banking boycott".

Chase Manhattan and Girard Bank

Plaintiffs have engaged in a considerable amount of discovery; they have deposed all of the important potential witnesses as well as filed numerous interrogatories and requests for document production.[6] Despite this extensive discovery process, plaintiffs have failed to adduce evidence sufficient to support a reasonable inference that Chase Manhattan Bank or Girard Bank conspired with the other defendants to boycott plaintiffs by refusing to extend them credit.

The present record shows that Chase Manhattan has had very limited contacts with plaintiffs. In November of 1977, Lincoln Bank of Bala Cynwyd, Pennsylvania, asked Chase to consider participating in a loan to the Eagles and Leonard Tose. (Affidavit of Thomas Reifenheiser, ¶2). Represen-

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[6]The parties have been permitted practically unlimited discovery, and one contends that additional discovery is needed.

tatives of Chase met with the Chairman of Lincoln Bank, Tose and his lawyer, Edwin P. Rome, on November 22, 1977 and again on November 28, 1977 to discuss provisions of the proposed loan. (Reifenheiser Affidavit, ¶2 and Reifenheiser Deposition at 43). During a third meeting on December 8, 1977, representatives from Chase, Lincoln and the Eagles shook hands and toasted with champagne a prospective agreement under which the two banks jointly would loan $7,000,000 to the football club and $1,725,000 to Tose. (Reifenheiser Deposition Exh. 10). Although the parties disagree about the significance of this handshake and toast, it is clear that no formal agreement on the loan had been reached.

On that same day, December 8, 1977, Chase requested its New York lawyers, the firm of Milbank, Tweed, Hadley and McCloy (Milbank) to review the legal aspects of the proposed Eagles/Tose loan. After reviewing the suggested terms of the proposed loan and security as well as the Eagles Partnership Agreement and the pending litigation against Tose by limited partners Barness and Firestone, the Milbank lawyers advised Chase not to make the loan because in their view Tose and the Eagles could not offer sufficient security. On December 27, 1977, Reifenheiser notified both Lincoln and Tose's attorney that it would not participate in the loan. (Reifenheiser Affidavit, ¶ 10).

Plaintiffs have uncovered almost no evidence of contacts between Chase and any of the alleged co-conspirators in this case. The present record reveals only one such communication occurring before December 27, 1977, the date when Chase formally rejected the request to participate in a loan to Tose and his football club. On December 9, 1977, an employee of Chase's credit department called the First Pennsylvania bank, where Tose and the Eagles had done their banking since 1969, to make a routine credit inquiry.

The Chase employee reported in a memorandum that a Mrs. Wilson of FPB had told him that FPB no longer dealt with Mr. Tose and referred to "published information" as providing an explanation for the bank's termination of relations with Tose. (Reifenheiser Affidavit, Exh. C).

There is evidence that *subsequent* to Chase's formal rejection of participation in a loan to plaintiffs, Herbert Barness, an alleged co-conspirator who is not now a defendant in this case, wrote a letter to a Senior Vice-President of Chase, Peter E. Lengyel, stating that he had an agreement with Tose which gave him a right of first refusal as to Tose's interest in the Eagles (Reifenheiser Affidavit, Exh. D). Thus, plaintiffs can point to only two contacts between Chase and any of the other purported co-conspirators, and one of these communications occurred after Chase formally had declined to make a loan to Tose and his football club. This evidence of two limited contacts is insufficient to support an inference that Chase joined the alleged conspiracy.

The evidence linking Girard Bank to a conspiracy to impose a banking boycott of the plaintiffs is even more tenuous. In September of 1977, James Duffy, an accountant for Leonard Tose, asked Peter Viera, a loan officer for Girard, if the bank would be interested in making a loan to Tose or the Eagles. Viera conveyed this request to Walton St. Clair, an Executive Vice President of Girard; St. Clair told Viera to tell Duffy that the bank would not be interested in such an arrangement because of Tose's reputation. (St. Clair deposition at 6-7, Girard's Memorandum in Support of Summary Judgment, Exh. C). Girard was approached a second time on the question of making a loan to plaintiffs; the president of a St. Louis bank telephoned William Eagleson, the President of Girard, to ask if Girard would be interested in participating in a loan to the Eagles. Although St. Clair told this bank that it had previously declined

to make such a loan, as a courtesy to it as a correspondent bank, Girard would be willing to consider the participation proposed by the St. Louis Bank. (St. Clair deposition at 9-10). After Eagleson and St. Clair discussed the matter again, however, they decided to and did tell the St. Louis bank they did not want to participate in a loan to the Eagles.

In January or February of 1978, Girard was approached for a third time about financing the Eagles. Mr. Duffy asked Mr. Viera if people from Girard would meet with him to discuss a loan. (St.Clair Deposition at 29). St. Clair agreed to such a meeting and at a luncheon attended by Viera, St. Clair and others, held in early February, 1978, Duffy proposed that Girard participate with First National City Bank of New York in a $5,000,000 loan to the Eagles. After this meeting, St. Clair discussed the proposal with several other officers of Girard who all counselled against the venture. After thinking about the matter over a weekend, St. Clair told City Bank that Girard would not participate in the Eagles loan. Plaintiffs have not come forward with any evidence that Girard spoke to any of the alleged co-conspirators in this case regarding its consideration of such a loan.

Based on the present record, I conclude that plaintiffs have failed to produce evidence from which a jury reasonably could infer that defendants Chase Manhattan and Girard participated in a conspiracy to deny Tose and the Eagles access to the credit market in Philadelphia and thus take control of the football club from him. Plaintiffs argue that the evidence regarding Chase and Girard would sustain an inference of conspiracy because it shows that they acted in conformity with the other defendants when they refused to extended credit to Tose and the Eagles and this refusal was against their own financial best interests. I do not share

plaintiffs' view of either the relevant law or of the facts presented by this case.

In *Venzie Corp. v. United States Mineral Prod. Co., Inc.*,[7] the Third Circuit held that the existence of a conspiracy to boycott or to engage in a concerted refusal to deal cannot be inferred from the mere fact of consciously parallel business behavior. There must also be a showing of 1) acts by defendants in contradiction of their own economic interests and 2) a motivation to enter an agreement. 521 F.2d at 1314-15. In the present case, although the defendant banks all declined to loan money to the plaintiffs after August of 1977, there is no evidence that Chase and Girard were aware that other lending institutions also were refusing the Eagles' requests for financing. More importantly, the evidence does not establish that Chase and Girard acted in contradiction of their economic interests by refusing to extend credit to Tose and/or the Eagles nor does it show that they had a motive to join any boycott against plaintiffs. Given the undisputed evidence of problems Tose was having with some of the limited partners as well as the financial difficulties the Eagles were allegedly experiencing in 1976 and 1977, a refusal to participate in a multimillion dollar loan to plaintiffs, standing alone, would not support an inference that the refusal was against the banks' financial best interests. Also, plaintiffs have not shown that either Chase or Girard had any economic or personal reason to want to force Leonard Tose to give up control of the club. Thus, I reject plaintiffs' contention that the failure of Chase and Girard to make a loan to the Eagles is in itself sufficient evidence connecting these banks to the alleged boycott.[8]

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[7] 521 F.2d 1309 (3d Cir. 1975).

[8] I recognize, of course, that the other banks also maintain that their refusals to make a loan to Tose and/or the Eagles were the result of independent and legitimate business judgment.

The FPB defendants, Philadelphia National Bank (PNB), Provident Bank and Sidney B. Forstater

As to the other defendants, FPB, John Bunting, John Pemberton, PNB, Provident and Sidney Forstater, I find that plaintiffs have identified evidence from which a jury reasonably could infer that they engaged in a conspiracy to form a banking boycott as alleged in the Amended Complaint. In the case of each of these defendants, there is some evidence that they discussed with other alleged co-conspirators their decisions not to extend credit to Leonard Tose or the Eagles.[9] Therefore, summary judgment on Count I cannot be granted in favor of the remaining defendants on the basis that plaintiffs failed to produce significant evidence of a conspiracy.

PNB, in its memorandum in support of a motion for partial summary judgment joined in by the other defendants, has argued that even if the plaintiffs could prove that defendants had participated in the conspiracy described in Count I, there would be no violation of the Sherman Act because there is no allegation or proof that this conduct produced an anticompetitive effect on the relevant markets, identified in the Amended Complaint as banking and professional football. Plaintiffs point out that the antitrust laws were not designed to remedy all economic harms but rather to prevent business practices which have an adverse impact on competitive conditions of the market.

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[9]Sidney Forstater, unlike the other defendants is not a lending institution or an official of such an institution. According to the Amended Complaint, Forstater's role in the conspiracy was to join with Bunting and Pemberton to use FPB's loan arrangement with the Eagles to force Tose to give up control of the Football club. After Tose defaulted on the FPB loan, FPB made Forstater Chief Financial Officer of the Eagles. It is Forstater's close association with the FPB defendants which provides evidence from which his participation in the conspiracy may be inferred.

Citing the Supreme Court's decisions in *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) and *Fashion Originators Guild of America, Inc. (FOGA v. F. T. C.*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941), plaintiffs urge that the alleged banking boycott constitutes a group boycott and thus is a *per se* violation, the plaintiff need not prove that it has had an anticompetitive effect. The Supreme Court has described *per se* violations as ". . . agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).

It is true that the Supreme Court has found group boycotts to be *per se* violations. However, as several lower federal courts have observed, not every case involving concerted activities is a group boycott within the meaning of the *Klor's* and *FOGA* cases, *supra*. The Third Circuit, quoting *Worthen Bank & Trust Co. v. National Bank Americard, Inc.*,[10] has noted:

> The term "group boycott" . . . is in reality a very broad label for divergent types of concerted activity. To outlaw certain types of business conduct merely by attaching the "group boycott" and "*per se*" labels obviously invites the chance that certain types of reasonable concerted activity will be proscribed.

DeFilippo v. Ford Motor Co., 516 F.2d 1313, 1317-18 (3d Cir. 1975), *cert. denied*, 423 U.S. 912, 96 S.Ct. 216, 46

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[10]485 F.2d 119, 125 (8th Cir. 1973), *cert. denied*, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974).

L.Ed.2d 141 (1975).[11] Moreover, the standard of analysis usually applied in cases involving claims of Sherman Act violations is the "rule of reason," which requires that plaintiff show that the disputed business practice has resulted in an unreasonable restraint of competition. *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 50 L.Ed.2d 176 (1977).

In the case now before the Court, the existing evidentiary record has not been sufficiently developed to permit me to determine whether the conduct complained of in Count I should be treated as a *per se* violation or as a violation to be analyzed under the "rule of reason". Therefore, I must reject defendants' contention that they are entitled to judgment as a matter of law on the ground that plaintiffs have not alleged or proved that the conspiracy described in Count I has produced an anticompetitive effect or an unreasonable restraint of trade.

By PNB's motion for partial summary judgment, defendants also raise claims regarding damages and standing. Relying principally on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), defendants urge that with the exception of the $308,155.99 sought for legal, accounting and financing fees incurred when Tose and the Eagles were required to find refinancing, the damages set forth in Count I must be dismissed because they do not represent antitrust injuries.[12]

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[11] *See also, E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973). *Ackerman-Chillingworth v. Pacific Electrical Contractors Assoc.*, 405 F.Supp. 99 (D. Hawaii 1975).

[12] *Pueblo Bowl-O-Matic, supra*, involved a treble damages action challenging several mergers which allegedly violated Section 7 of the Clayton Act. Finding that the mergers had actually stimulated competition because they kept some bowling alleys in business that would have failed, the Supreme Court reversed the findings of the Court of Appeals as well as the jury's verdict in favor of plaintiffs.

Having reviewed the evidence, I find that the record concerning the issue of damages is incomplete, and material facts remain in dispute. Consequently, I must reject defendants' argument that they are entitled to summary judgment on the damage question.

Defendants also argue that both Leonard Tose and Tose, Inc. lack standing to bring this suit under Section 4 of the Clayton Act. It is alleged that Tose does not have standing because 1) he has not suffered an injury by reason of anything forbidden in the antitrust laws and 2) he is a partner, who like a shareholder, is not among those persons protected by the antitrust laws. I am not persuaded by the defendants' analysis.

As the Third Circuit noted in *Cromar Co. v. Nuclear Materials & Equipment Co.*, 543 F.2d 501 (1976), questions of standing in Clayton § 4 cases are complex, and each case "must be carefully analyzed in terms of the factual matrix presented." 543 F.2d at 506. Some of the factors to be considered in determining whether a party has standing to bring a treble damages action are: 1) the nature of the industry in which the alleged antitrust violation exists, 2) the relationship of the plaintiff to the alleged violator and 3) the alleged effect of the antitrust violation upon the plaintiff. *Id.*

Viewing this case in light of the principles set forth in *Cromar, supra,* I find that defendants are not entitled to summary judgment on the basis that Tose and Tose, Inc. do not have standing. Count I alleges that the conspiracy was directed at both Tose and the Eagles. Indeed, plaintiffs have enumerated five alleged acts by the defendants which they describe as "elements" of the conspiracy to boycott; of these, four involve harms directed at Tose personally. Also, Count I contends that as a result of the conspiracy

Tose, Inc., a corporation wholly owned by Tose until June of 1979, was unable to obtain financing and the value of its shares diminished accordingly.

B. *COUNT II—VIOLATION OF THE BANK HOLDING COMPANY ACT AMENDMENT OF 1970.*

Count II alleges a cause of action under the Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1972(1)(C), against the three FPB defendants: the Bank, John R. Bunting and John C. Pemberton. Section 1972(1)(C) prohibits a bank from conditioning the extension or continuation of credit on the requirement "that the customer provide some additional credit, property or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit or trust service." FPB's argument in support of its request for summary judgment on Count II is not a convincing one. According to the FPB defendants, plaintiff's Bank Holding Act claim is premised on a Fifth Circuit decision, *Swerdloff v. Miami National Bank*, 584 F.2d 54 (1978). However, there is nothing in the Amended Complaint or in other papers submitted by plaintiffs to suggest that they have grounded their § 1972(1)(C) claim on the principles set forth in *Swerdloff, supra*.

Although there is a dearth of cases dealing with 12 U.S.C. § 1972, the legislative history shows that the statute was designed to supplement the antitrust laws and to prohibit certain tying arrangements by banks and bank holding companies. *Hometowne Builders, Inc. v. Atlantic National Bank*, 477 F.Supp. 717, 719 (E.D. Va. 1979). Plaintiffs allege that the FPB defendants "tied" the continuance of its $6,000,000 loan to them on conditions usually not required of the Bank's customers. Contrary to the defendants' assertions, these allegations state a cause of action under § 1972(1)(C). As the record now stands, it cannot be said

that plaintiffs could not prove a § 1972 violation; consequently, defendants are not entitled to summary judgment on Count II.

C. *COUNT III.—PENDENT STATE TORT CLAIMS*

Court III asserts two pendent state tort claims against the defendants. It is alleged that they have engaged in a malicious interference and conspiracy to interfere with plaintiffs' advantageous contractual relations and with their advantageous business prospects. The factual allegations upon which these claims are based are those set forth in Count I concerning the conspiracy to boycott. Under Pennsylvania law, in order to prevail in a tort action for interference with prospective contractual relations, a plaintiff must show 1) existence of prospective contractual relation, 2) the purpose or intent to harm plaintiff by preventing the relationship from occurring, 3) the absence of privilege of justification on the part of the actor and 4) the occurrence of actual harm or damage to plaintiff as a result of the actor's conduct. *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895 (1971).

I have already concluded that plaintiffs have not adduced evidence from which a jury reasonably could infer that defendants Chase Manhattan Bank and Girard Bank have participated in the conspiracy described in Count I, and since plaintiffs have not alleged nor do they have evidence to prove additional facts that would support a finding that Chase and Girard have interfered or conspired to interfere with plaintiffs' contractual or prospective business relations, I will grant summary judgment on Count III in their favor. As to the other defendants, however, I find there is evidence in the present record from which a fact find could conclude that these defendants did intentionally interfere with the prospective contractual relations of Tose and the Eagles in

their efforts to find financing and that plaintiffs suffered harm as a result of this interference. Consequently, since the remaining defendants are not entitled to judgment on Count III as a matter of law, I will deny the motions of FPB, Bunting, Pemberton, Forstater, PNB and Provident for summary judgment on the state law claims.

D. *COUNT IV—CONSPIRACY TO FIX INTEREST RATES*

Count IV of the Amended Complaint charges that since 1969 the defendants, with the exception of Sidney Forstater, in violation of Sections 1 and 2 of the Sherman Act, have conspired to fix interest rates in the four Pennsylvania counties of Philadelphia, Bucks, Delaware and Montgomery. Alleging that no genuine issue as to any material fact exists, both the plaintiffs and the defendants have moved for summary judgment on this count. I agree with their assessment; the evidence on this issue is complete, and no genuine issue of fact remains in dispute.

Plaintiffs' arguments in support of the claim that they are entitled to judgment on the interest fixing claim as a matter of law change somewhat from one brief to the next. Nonetheless, their principal contention appears to be that the evidence shows that the defendant banks have "tampered" with the structure of the prime interest rates of the banking industry in the Philadelphia area and thus have committed a *per se* violation of the Sherman Act.

To buttress their claim that the defendants have fixed their prime rates and thereby stabilized the rate of all Philadelphia area banks, the plaintiffs point to the following evidence of record: 1) since 1969 the prime interest rates of the defendants have tended to fluctuate in a similar pattern and to remain uniform; 2) the executive officers of the defendant banks have had the opportunity to conspire because they sit

on the executive committees of other Pennsylvania financial institutions as well as frequently meet through trade associations; and 3) the defendant banks have participated in some joint loan agreements in which they have agreed that all participating banks in the particular joint venture are to charge the interest rate set by one bank.

Plaintiffs cite *United States v. Socony-Vacuum Oil Co. Inc.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) and *United States v. Container Corp.*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), two seminal decisions concerning price fixing, as the legal authority controlling the prime rate issue in this case. It is their argument that the joint loan agreements constitute a *per se* "naked price restraint" within the meaning of the *Socony* and *Container* cases, *supra*. Although they did not have a participation loan from any of the defendant bank during the period relevant to this lawsuit, plaintiffs allege that the existence of the joint loans, with clauses agreeing to charge a single rate, affected the interest rates of all loans granted by banks in the Philadelphia area and therefore had an anticompetitive effect on the entire lending market.

The defendant banks do not dispute that their prime rates have tended to be uniform; nonetheless, they deny that they have ever agreed with any other lending institution to the establishment of their prime rate. Defendants attribute the uniformity of interest rates to the fact that money is fungible and economic forces usually compel competitors to sell a fungible product at the same price. In addition, defendants assert that joint or participation loans, which are authorized by statute in Pennsylvania,[13] do not violate the antitrust

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[13] 7 P.S. § 305.

laws.[14] The principal arguments advanced by defendants in support of their claims that they are entitled as a matter of law to summary judgment on Count IV are that the evidence does not establish the existence of a conspiracy to fix prime rates and the joint loan is not a *per se* violation of the antitrust laws because it increases the availability of credit.

After considering the facts of this case as well as the relevant case law, I grant summary judgment in favor of the defendants on Count IV of the Amended Complaint. Plaintiffs concede that there is no direct evidence of an express agreement among the defendant banks to establish a uniform prime rate.[15] Thus, in order to establish a conspiracy, plaintiffs must rely on the inferences to be drawn from the undisputed facts of similar prime rates, the opportunity to conspire and the existence of certain participation loans which include agreements to charge a single interest rate. The fact that the prime rates of defendant banks have tended to be uniform and the fact that the banks have had the opportunity to meet and conspire is not enough

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[14]There are two types of joint or participation loans. In a "true participation" loan, each bank is sold a share in the credit extended by the lead bank and must take the interest rate set. In a "syndicating" loan, each participating bank agrees that the interest rate of the lead bank or the prime of a non-participating bank will control. See Reply Memorandum of PNB (to plaintiffs' supplemental memorandum in opposition to defendants' motion for summary judgment pp. 4-5).

[15]One of the briefs submitted by plaintiffs states:

The factual thrust of plaintiffs' argument is not that there was an express agreement to fix the prime rate on single as against joint loans, but that the express written agreements on so many joint loans, involving billions of dollars on a constantly revolving basis over all of the years of the Eagles-Tose loan (1969-77) with reciprocal provisions to follow-the-leader on prime rate constituted a 'tampering' with the prime rate on single loans within the meaning of these Supreme Court cases, and hence a *per se* violation of Section 1 of the Sherman Act. (Plaintiffs' Supplemental Memorandum in Opposition to Defendants' Motions for Summary Judgment, pp. 4-5.)

evidence to sustain an inference that a conspiracy existed and plaintiffs apparently concede as much.[16]

Plaintiffs' theory that they are entitled to summary judgment on Count IV is premised on the notion that the joint loan agreements entered into by the defendant banks are *per se* violations of the Sherman Act. As I noted previously in this memorandum, if a Sherman Act case involves one of those business practices which have been classified by the courts as a *per se* violation, the plaintiff does not have to prove the challenged conduct has had an anticompetitive effect on the relevant market. In the present case, plaintiffs maintain that the provisions of the joint loan agreements requiring a bank to adopt the prime rate of competitor constitute price fixing, which is a *per se* violation.

I cannot accept this characterization of participation loans. Although it is true that price fixing is among those concerted activities that the Supreme Court has found to fall within the *per se* category, the Court has not labelled every agreement among competitors to set the price of a good or service as price fixing. *See United States v. Addyston Pipe & Steel Co.*, 85 F.2d 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). In a recent opinion, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), the Supreme Court expressed its reluctance to characterize a business activity as *per se* price fixing. In that case, the Court, reversing the decision of the Second Circuit, declined to find the defendants' issuance of a blanket license granting the purchaser a nonexclusive right to perform any of the songs found in their repertoire for a fixed annual fee to be price fixing within the meaning of the Sherman Act. The decision in

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[16]See n. 15, *infra*.

Broadcast Music was based on two principles: 1) the courts will classify a business relationship as a *per se* violation only after considerable experience with practice[17] and 2) the *per se* classification only applies to business conduct which is plainly anticompetitive. The Supreme Court stated the following test for determining whether a practice should be categorized as a *per se* violation:

> In characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect, and, here because it tends to show effect, the purpose of the practice is to threaten the proper operation of our predominantly free market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more rather than less, competitive.'
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> 441 U.S. at 19-20, 99 S.Ct. at 1553. (footnotes and citations omitted).

Since the practice of banks entering into a joint or participation loan agreement at a set interest rate is not one which has been scrutinized by the courts, it would not be appropriate to automatically classify the practice as a *per se* violation of the Sherman Act. Moreover, the participation loan is not plainly anticompetitive. Indeed, it is urged as an acceptable practice which increases the availability of credit because most large loans would not be possible if banks were not able to extend joint credit.

Since plaintiffs have relied solely on a *per se* violation theory as to Count IV and have not adduced any evidence at this summary judgment stage or suggested they will be

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[17]*See United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972).

able to produce such evidence at trial to support their claim under a rule of reason analysis, I will deny their motion for partial summary judgment and grant summary judgment in favor of all of the defendants. A copy of my order of May 16, 1980 is attached to this memorandum.

APPENDIX C.

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys fee.

12 U.S.C. 1972 (1)(C)

> "A bank shall not in any manner extend credit . . . on the condition or requirement . . . (C) that the customer provide some additional, property, or service to such bank, other than those related to and usually provided in connection with a loan . . ."

Section 1975 authorizes private actions for treble damages for violations of 1972.